80-581

No. 80-_____

Supreme Court, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

JURISDICTIONAL STATEMENT

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant
Western Energy Company

Of Counsel:
GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant
Westmoreland Resources, Inc.

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants
except Western Energy
Company

October, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-_____

COMMONWEALTH EDISON COMPANY, *et al.*,
Appellants,

—against—

STATE OF MONTANA, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

In 1975, at a time of national energy crisis, Montana imposed a severance tax of 30% on coal mined in the state, including coal from federal reserves which comprise three-quarters of the total. This new tax was imposed on top of many other taxes and sources of revenue already available to Montana. This action, commenced by eleven midwestern and southwestern electric utility companies which use coal mined in Montana and by their Montana coal suppliers, seeks to establish that the tax is excessive in amount and thereby violates the Commerce and Supremacy Clauses of the

United States Constitution. As the Montana Supreme Court has said (Opinion 15; Apdx. 17a):*

> No more important case on the power of states to levy taxes can be imagined than is presented here.

We agree.

In particular, the following questions are presented:

1. Did the state court err in holding, in the face of a challenge under the Commerce Clause, that the State of Montana may, as a matter of law, tax the severance of coal destined for immediate export to other states without limit as to amount and without regard to the substantial adverse effect the tax has on interstate commerce?

2. Did the state court err in holding, as a matter of law, that the Montana Coal Severance Tax does not violate the Commerce Clause of the United States Constitution because a tax imposed for the general support of government is, as a matter of law and without any limit as to amount, "fairly related" to the services and protection provided by the state to the taxpayer?

3. Did the state court err in rejecting, out of hand, plaintiffs' claim that the Montana Coal Severance Tax discriminates against interstate commerce notwithstanding the fact that the tax was manifestly "tailored" to fall on such commerce?

4. Did the state court err in rejecting plaintiffs' claim that the Montana Coal Severance Tax violates the

---

* "Opinion" refers to the decision by the Supreme Court of Montana. "Apdx." refers to the Appendix to this Jurisdictional Statement.

Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the effectiveness of federal statutes intended to encourage the production and use of coal in general, and particularly western coal, and despite defendants' admission, for purposes of the present proceeding, of the truth of the underlying facts?

5. Did the state court err in denying plaintiffs an opportunity to prove at trial their claim that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the national policy embodied in the Mineral Lands Leasing Act of 1920 which reserved federally-owned coal to the federal government and allocated the revenues, as between the states and the federal government, in a fixed proportion?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Supreme Court of the State of Montana are listed in the caption.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
DECISION OF THE COURT BELOW	1
JURISDICTIONAL BASIS OF THIS APPEAL	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
Statement of Facts	3
The Proceedings Below	8
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	12
I. ANY RULE WHICH AUTHORIZES ENERGY-RICH STATES TO IMPOSE UNLIMITED TAXES ON ENERGY RESOURCES DESTINED FOR OTHER STATES CAN ONLY LEAD TO A BALKANIZATION OF THE NATION CONTRARY TO THE FUNDAMENTAL PURPOSE OF THE COMMERCE CLAUSE	12
II. A STATE TAX ON AN ACTIVITY WHICH "SUBSTANTIALLY AFFECTS" INTERSTATE COMMERCE, BUT IS NOT YET "IN" INTERSTATE COMMERCE, SHOULD BE EXAMINED UNDER THE COMMERCE CLAUSE	15

PREVIOUS PAGE WAS BLANK

PAGE

III. THE RESULT BELOW MISCONTRUES RECENT DECISIONS OF THIS COURT ON IMPORTANT ISSUES CONCERNING THE CONSTITUTIONAL STANDARDS TO BE APPLIED TO STATE TAXES 19

IV. THE BURDEN OF MONTANA'S SEVERANCE TAX IS "TAILORED" TO FALL ON RESIDENTS OF OTHER STATES AND THEREFORE DESERVES SPECIAL SCRUTINY 21

V. A STATE TAX WHICH SUBSTANTIALLY FRUSTRATES FEDERAL ENERGY POLICIES SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE 22

VI. A STATE TAX WHICH SUBSTANTIALLY FRUSTRATES THE FEDERAL STATUTORY DIVISION OF ROYALTIES FROM FEDERAL COAL DEPOSITS SHOULD BE HELD INVALID UNDER THE SUPREMACY CLAUSE 25

CONCLUSION 26

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	PAGE
Austin v. *New Hampshire*, 420 U.S. 656 (1975) .	22
Budget Rent-a-Car of Wash. v. *Multnomah Cty.*, 287 Or. 93, 597 P.2d 1232 (1979)	20
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) .	16
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 9, 10, 19, 20, 22	
Exxon Corp. v. *Wisc. Dep't of Rev.*, 100 S. Ct. 2109 (1980).....	19
Heisler v. *Thomas Colliery Co.*, 260 U.S. 245 (1922) 9, 15-18	
Hill v. *Florida*, 325 U.S. 538 (1945).....	23
Hines v. *Davidowitz*, 312 U.S. 52 (1941).....	23
Hood & Sons v. *Du Mond*, 336 U.S. 525 (1949)	13
Hope Gas Co. v. *Hall*, 274 U.S. 284 (1927).....	15
Hunt v. *Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977).....	18
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977)	23
Labor Board v. *Jones & Laughlin*, 301 U.S. 1 (1937).....	17
Lewis v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009 (1980).....	17
McLain v. *Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980).....	17

PAGE

McGoldrick v. *Berwind-White Co.*, 309 U.S. 33 (1940) 22

Merrion v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) (*en banc*), *cert. granted*, 49 U.S.L.W. 3208 (Oct. 6, 1980) 14, 20

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954) 13

Mobil Oil Corp. v. *Commissioner of Taxes of Vt.*, 100 S.Ct. 1223 (1980) 19

Nash v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967) 23

Nippert v. *Richmond*, 327 U.S. 416 (1946) 18

Oliver Iron Co. v. *Lord*, 262 U.S. 172 (1923)...15, 16

Parker v. *Brown*, 317 U.S. 341 (1943) 18

Perez v. *Campbell*, 402 U.S. 637 (1971)..... 23

Philadelphia v. *New Jersey*, 437 U.S. 617 (1978). 17

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 18

Washington Rev. Dep't v. *Stevedoring Ass'n*, 435 U.S. 734 (1978) 20, 22

Wickard v. *Filburn*, 317 U.S. 111 (1942)..... 17

Constitutions & Statutes

1979 Mont. Laws, ch. 698..... 7

Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, as amended, 42 U.S.C. § 1857 *et seq.* 1, 3

PAGE

Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 1

Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871..... 2

Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233..... 2

Energy Research and Development Administration Act, Pub. L. No. 95-39, 91 Stat. 180..... 2

Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 2

Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 2

Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, 88 Stat. 1878 2

Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 .....2, 6, 11, 25

Montana Code Annotated:

15-6-132..... 6

15-6-138(b) 6

15-31-101 *et seq*..... 6

15-35-101 *et seq*..... 1

15-35-101(e) 6

15-35-102..... 4

15-38-104..... 6

Mont. Const. art. IX, § 5 7

PAGE

Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 2

Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 .....2, 22

United States Code:

28 U.S.C. § 1257(2) 1

30 U.S.C. § 189 25

30 U.S.C. § 191 6

U.S. Const. art. 1, § 8, cl. 3 1

U.S. Const. art. VI, cl. 2 1

Other Authorities

Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219 (1957) 13

Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report (Rand Corporation, August 1976) 2

T.O. Cohea, *Coal Board Grants* (January 11, 1978) 7

Developments in the Law, *Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953 (1962) 13

W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245 (1979) 13, 15, 21

Kalispell Representative Says Coal Tax Too Low, The Missoulian, January 11, 1975 2

PAGE

Posner, *Economic Analysis of Law* (2d ed. 1977) 13

Robinson, *Coal Impact and Coal Board Grants* (September 20, 1977) 7

Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. 629 (1977) ... 7

Towe, *Explanation of Reasons for Montana's Coal Tax* (1976) 21

DECISION OF THE COURT BELOW

The decision of the Supreme Court of the State of Montana, dated July 17, 1980, is not yet reported. It is reprinted in the Appendix at pages 1a-40a.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of the State of Montana holding that a state tax statute is valid. In their Complaints, and throughout the proceedings in the state courts, plaintiffs drew into question the validity of that statute on the ground of its repugnance to the Constitution and laws of the United States. Judgment was deemed to have been entered on July 17, 1980, when the decision of the court below was docketed by the Clerk of the Supreme Court of the State of Montana. Notices of Appeal were filed with the Clerk of that court on October 2 and 6, 1980. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case raises questions concerning the validity of the Montana Coal Severance Tax, Montana Code Annotated §§ 15-35-101 *et seq.*, under the Commerce and Supremacy Clauses of the United States Constitution, art. 1, § 8, cl. 3 and art. VI, cl. 2, respectively, and many federal statutes encouraging, mandating or regulating the use of coal.[1] The text of these authorities, insofar as presently pertinent, is set out in the Appendix.

---

1 Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, as amended, 42 U.S.C. § 1857 *et seq.*; Emergency Petroleum Allocation

STATEMENT OF THE CASE

This case presents issues as old as the Republic and as timely as tomorrow's headlines. It involves an attempt by one state, having an abundant supply of a vital natural resource—here low sulphur coal—to exact a tribute from the inhabitants of her energy-poor sister states. Montana's policy has been described as one of "OPEC-like revenue maximization", having no relationship to any legitimate needs of the State.[2] As noted by one of its principal sponsors, "[i]n the energy crunch today, Montanans should remember that the Arabs have the oil but Montana has the coal. . . ."[3]

Montana does not own any significant portion of this coal. Indeed, the record establishes that three-quarters of the coal in Montana belongs to the federal government. What Montana here seeks to do is to force the rest of the country to pay Montana an excessive tax for the use of a

---

Act of 1973, Pub. L. No. 93-159, 87 Stat. 627; Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871; Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233; Energy Research and Development Administration Act, Pub. L. No. 95-39, 91 Stat. 180; Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246; Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083; Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 95-577, 88 Stat. 1878; Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437; Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350; Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289.

2 Rand Corporation, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report* 148 (August 1976).

3 Representative Ora Halvorson of Kalispell, Montana, Vice Chairman of the Montana House Taxation Committee, quoted in *The Missoulian*, January 11, 1975.

vital natural resource fortuitously located within its borders. While the tax is a severance tax in form, it is the functional equivalent of an export duty in fact, since virtually all of the coal is destined for interstate shipment under contracts which provide, in effect, that the tax will be passed along to ultimate consumers in other states.

Montana and its courts have taken the position that the Constitution imposes no limits on the power of that state to impose such taxes. According to Montana, a tax equal to 100%, or even 1,000%, of the value of the coal may be imposed, and neither the Commerce Clause nor the Supremacy Clause can be invoked to prevent it.

This case thus presents fundamental questions of the state's power to impose taxes which cry for decision by this Court. If ultimately upheld, Montana's Coal Severance Tax foreshadows a trend in state taxation of energy resources which can only lead to the Balkanization of this nation in the same way that OPEC's efforts have fragmented the world economy. In the end, the far-reaching question presented by this appeal is whether the United States Constitution limits the power of energy-rich states to exact virtually unlimited tribute in the form of taxes from the rest of the country, notwithstanding the lack of need for such taxes and the adverse effects such taxes may have on interstate commerce and on national policies designed to meet the energy needs of the nation.

Statement of Facts

In 1975, in response to increased demand for low sulphur coal generated largely by the Clean Air Act of 1970 and in the aftermath of the 1973 Arab oil embargo, Montana increased its severance tax on coal to

unprecedented levels. As a result, substantially all of the coal now mined in the state is taxed at 30% of value.[4] This is, by far, the highest rate in the nation. Coal taxed at the rate of 34 cents per ton prior to the 1975 amendment is now typically taxed at the rate of $2.08 per ton, with some taxpayers presently paying as much as $4.63 per ton. On a percentage basis, the increases from 1975 to date thus amount to from 500% to 1,250%.

It is clear that the tax has a substantial effect on interstate commerce and was always intended to do so. As the Montana legislature well knew at the time this tax was passed, the great bulk of coal mined in Montana is immediately shipped out of state pursuant to long-term coal purchase agreements which provide that the costs of taxation will be passed along to the consuming utilities. These utilities, in turn, must adjust the price of electricity to their customers to reflect increased fuel costs. In 1979, such out of state shipments aggregated 28 million tons of coal, accounting for at least 90% of the value of Montana's entire production. Plaintiffs paid severance taxes of about $60 million on these shipments. Under the terms of existing contracts, they estimate that the amount payable over the next two decades will reach several billion dollars.

These facts loomed large in the adoption of the tax. While the technical incidence of the tax is on the coal producing plaintiffs in Montana, selection of coal as the object of the extraordinary tax permitted the Montana legislature to export the practical effect of the tax to

---

4 Value is defined as the "contract sales price," *i.e.*, the price of coal when extracted and prepared for shipment f.o.b. mine, less production taxes. § 15-35-102, M.C.A.

consumers in other states who are unable to vote in Montana. For reasons such as these, the tax has enjoyed unparalleled popularity within Montana. Since its passage, there has been no substantial opposition to it.

It is equally clear that the tax may have a substantial adverse effect on the many efforts of Congress to shift this nation's energy reliance away from foreign petroleum products and toward increased reliance upon coal. The vast resources of coal found in the western United States—much of it owned by the federal government—are a cornerstone of these vital policies. If permitted to do so, plaintiffs would be prepared to show at trial that federal statutes have so encouraged the use of such coal, particularly for electric utility purposes, as to virtually mandate its use. The excessive costs imposed by this tax manifestly tend to frustrate the central purpose of those statutes.[5]

Montana finds itself able to exact taxes of this magnitude because of its unique position with respect to coal. One-quarter of our entire national reserves, and over one-half of our national reserves of low sulphur coal, are located in Montana. Montana and Wyoming together contain 40% of this nation's coal. But this is not to say that the coal "belongs" to Montana and Wyoming or comprises their exclusive "birthright". To the contrary, fully three-quarters of these reserves have historically belonged to the federal government and still belong to it.

---

5 In this connection, the State of Texas appeared as *amicus* in the Court below in favor of plaintiffs. Its representations to this effect are compelling.

The principal justification of the tax profferred by defendants is that the tax revenues are necessary to meet the impact costs of coal mining. This is simply not true. Unhindered by the sorts of pressures which typically restrain excessive taxes, the Montana legislature set the rate of the tax with an eye toward revenue-maximization, in the mold of the OPEC nations. In fact, legislative findings preceding the Montana statute clearly emphasize the "economic rents"[6] to be obtained from the coal mining activity, rather than the needs of the state. *See* § 15-35-101(e), M.C.A.; Apdx. 62a-63a. Because the case was disposed of below on a motion to dismiss, plaintiffs have never had an opportunity to make a full factual record. Certain facts nevertheless show that the disparity between needs and revenues is great.

1. Even without a severance tax, the costs of coal mining which impact on the State of Montana would be covered by other taxes[7] and by federal revenue programs which predated the severance tax.[8] Indeed, Governor Judge of Montana has testified that the federal revenues

---

6 The term "economic rents" is generally accepted to mean the difference between the costs of production, including an acceptable profit, and the market price of a commodity.

7 The State of Montana and its local subdivisions impose a number of taxes on the mining of coal. For example, a resource indemnity trust tax (15-38-104, M.C.A.); a gross proceeds tax (15-6-132, M.C.A.); a property tax on mining equipment (15-6-138(b), M.C.A.); and a corporate license tax (15-31-101 *et seq.*, M.C.A.).

8 As noted, roughly 75% of the coal in Montana is actually owned by the federal government. Under the Mineral Lands Leasing Act of 1920, as amended, Montana is entitled to a direct rebate of 50% of all federal royalties on mineral leases within its borders; additionally, the federal government must use an additional 40% of such royalty revenues on reclamation projects in the affected states. 30 U.S.C. §191.

alone are now sufficient to cover all of the state's impact costs.[9] If any further confirmation of this is necessary, it need only be noted that since December 31, 1979, fully 50% of the entire coal tax revenues have been deposited into a constitutional trust fund which may not be used except upon a three-quarters vote of both houses of future legislatures. Mont. Const. art. IX, § 5.

2. Experience now shows that legitimate needs have already been met. This is confirmed by studies done by the state, itself,[10] and by the plaintiffs here. Moreover, property tax rates in affected communities have dropped, not risen, since the onset of large-scale coal mining, and the state, itself, has adopted general tax relief measures for its own citizens which were made possible because of excessive coal tax revenues.[11]

In fact, while much has been made in public discussions of the need for public funds for "boom-towns," reclamation and other legitimate costs, defendants have admitted for purposes of a motion to dismiss that the tax is not fairly related to the services and protections provided by the state. (Complaint, ¶ 26; Apdx. 55a). In support of this allegation, plaintiffs expected to show that the legitimate local impact costs—for schools, roads, police, fire and health protection, and

---

9 *Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess. 629 (1977).

10 T.O. Cohea, *Coal Board Grants* 15 (January 11, 1978); Robinson, Office of the Montana Legislative Fiscal Analyst, *Coal Impact and Coal Board Grants* 25-26 (September 20, 1977).

11 *E.g.*, 1979 Mont. Laws, ch. 698, amending §§ 15-30-112, 15-30-114, 15-30-122, and 15-30-142, M.C.A.

environmental protection and the like—might amount to approximately 2¢ per ton, compared to present average revenues of Severance Tax alone of over $2.00 per ton.

In sum, if they had not been precluded from doing so, plaintiffs would have introduced evidence at trial which would have demonstrated that revenues expected from this tax were grossly disproportionate to the services and protections provided by the state, however those services and protections may be measured.

The Proceedings Below

In their Complaints, filed in June, 1978, in the Montana District Court for the First Judicial District, Lewis and Clark County, plaintiffs sought a refund of over $5.4 million in taxes paid under protest, a declaration that the tax was invalid under the Commerce and Supremacy Clauses of the United States Constitution, and an injunction against its further collection. A copy of the initial Complaint is reprinted in the Appendix at pages 45a to 61a.[12]

The defendants are the state, itself, and various public officials who are responsible for collection or enforcement of the tax. Defendants moved to dismiss all of the claims for failure to state claims upon which relief could be granted. Without any factual record before it, the trial court granted defendants' motion.

---

12 In each quarter since that time, plaintiffs have filed additional Complaints seeking a refund of successive quarterly tax payments. Additionally, Western Energy Company has filed separate Complaints. In the aggregate, the total amount now in issue exceeds $120 million.

On appeal, the Montana Supreme Court passed on these claims as follows:

1. In Count One of their Complaint, plaintiffs asserted that the Coal Severance Tax substantially affects interstate commerce in coal (Complaint, ¶¶ 10, 22; Apdx. 49a, 54a) and that it constitutes an undue burden on commerce in that it (i) is not fairly related to services and protection provided by the state (Complaint, ¶ 26; Apdx. 55a) and (ii) in fact, singles out an interstate activity for tax and thereby discriminates against interstate commerce (Complaint, ¶ 27; Apdx. 55a). *See, e.g., Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

The Montana Supreme Court rejected these contentions at the threshold, finding "that the severance of coal here is a taxable event that precedes entry into interstate commerce" and is "not an interstate activity" and that, in such circumstances, the Commerce Clause imposes no limit on the power of the states to tax. (Opinion 15; Apdx. 18a). To arrive at this conclusion, it seized upon a series of decisions in this Court—all more than 50 years old—discussing the power of the states to tax the extraction of natural resources and related activities, particularly relying on *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Citing those cases, the court below argued that the Commerce Clause imposes no limit on the power of the state to tax the severance of natural resources, regardless of the impact the tax might have on the interstate commerce in that commodity.

The principal legal question presented here is whether *Heisler* and the other early cases may properly be used in modern times to immunize a state severance tax from scrutiny under the Commerce Clause.

In an alternative holding, the Montana Supreme Court also found that the Montana tax meets the modern Commerce Clause tests, if they apply. In particular, it construed the "fairly-related" prong of the four prong test set forth in *Complete Auto Transit, Inc.* v. *Brady, supra*, in a way which would permit any state tax to meet that test as a matter of law, holding that (Opinion 19; Apdx. 22a-23a):

> Taxes as here imposed for the general support of the government are fairly related to that purpose by the mere fact that a government is thereby maintained.

It further held (*id.*):

> It is only when the taxpayer has an insufficient nexus to the taxing state, or the tax is disproportionate to the incidents of commerce being taxed, that the fair-relation test applies.

2. In Count Two, plaintiffs asserted that the Coal Severance Tax substantially frustrates national policies reflected in a variety of federal statutes intended to encourage the use of coal, and particularly western low-sulphur coal, to meet national energy requirements. (Complaint, ¶¶ 30-32; Apdx. 55a-56a). The decision of the Montana Supreme Court rejected these contentions without permitting plaintiffs the opportunity to prove them. The court below ignored the precise holdings of this Court to the contrary, and required that as a prerequisite to finding preemption there must be a showing that "Congress *intended* to nullify other national, state, local or individual policies . . . ." (Opinion 28; Apdx. 33a). (Emphasis supplied).

3. In Count Three, plaintiffs asserted that the Coal Severance Tax also substantially frustrates a national

policy reflected in the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, as from time to time amended. (Complaint, ¶¶ 34-44; Apdx. 56a-59a). Under that Act, Congress determined to retain mineral resources in the western states for the people of the entire nation, subject to payment of a share of royalties to the states. (Complaint, ¶ 38; Apdx. 57a). As a result, some three-quarters of the coal reserves in Montana belong to the federal government. The essence of the Act is a compromise which channels the revenues from this mineral wealth to the federal government, in the first instance, subject to later division with the states in a fixed proportion.

Notwithstanding the federal policy set forth in this basic compromise—on the existence of which the Montana Supreme Court did not rule—it found that a proviso in the Act continuing "any rights which [the state] may have" to tax constituted "a clear expression of federal policy" which permitted state taxation, without regard to the effect the tax might have on the compromise itself. (Opinion 33; Apdx. 38a-39a). Thus, the net effect of the Montana Coal Severance Tax is to appropriate the "economic rents" from such reserves directly to the state, before they can be secured by the federal government in accordance with the Act. (Complaint, ¶ 42; Apdx. 59a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. ANY RULE WHICH AUTHORIZES ENERGY-RICH STATES TO IMPOSE UNLIMITED TAXES ON ENERGY RESOURCES DESTINED FOR OTHER STATES CAN ONLY LEAD TO A BALKANIZATION OF THE NATION CONTRARY TO THE FUNDAMENTAL PURPOSE OF THE COMMERCE CLAUSE.

The result announced by the court below foreshadows grave practical consequences for this nation in that it can only lead to serious division between those states which have access to energy resources and those which do not. In essence, the Montana Supreme Court held that the Commerce Clause imposes no limit whatsoever on the power of the individual states to extract taxes based on the severance of energy resources destined for export to other states. This position came into vivid focus when defendants conceded that it would make no difference to their analysis of the case if the tax were raised to 1,000% or 2,000%.[13] This contention was tacitly accepted by the court below and inevitably follows from its decision. Thus, in its view, the only limitation on the rate of a state's tax substantially affecting commerce is that set by the state's legislature. (Opinion 18; Apdx. 22a). This is a dangerous view.

The availability of energy resources, and the price which they command, is one of the most divisive issues of our time. Armed with unfettered power and freed from constitutional restraint, the self-interests of energy-

---

13 Counsel for defendants also argued that the Commerce Clause did not come into play until a state's tax imposed a *de facto* embargo against exportation of coal or actually brought the commerce in coal to a complete halt at the state's borders.

rich states must come into conflict with those which lack such resources and with the national interest in energy issues. Any constitutional rule which permits states to adopt "OPEC-like revenue maximization" policies clearly cuts across the balance between state and federal power lying at the heart of the Commerce Clause and exposes the nation to Balkanization. Where a state tax approaches a tax on exports—as this tax does[14]—it offends the basic premise that this nation constitutes a nationwide free trade area in which one state is not permitted to throw up undue trade barriers at the expense of its sister states. *See, e.g., Hood & Sons* v. *Du Mond*, 336 U.S. 525, 538-39 (1949). In similar circumstances, involving taxes which are functionally indistinguishable from severance taxes, this Court has not hesitated to act. *E.g., Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 374 U.S. 157 (1954). No functional distinction exists between severance taxes and other taxes such as the foregoing and, accordingly, no valid policy justifies the rule adopted here. *See* W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 248 (1979) (hereinafter cited as "Hellerstein").

Montana's tax is a prime example of the abuses which may flow from any rule which leaves the states with unfettered power to tax. It was designed to shift billions of dollars to Montana directly from the citizens of other states by the end of the century and to use a substantial

---

14 *See* Developments in the Law, *Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 970-71 (1962); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219, 232-33 (1957); Posner, *Economic Analysis of Law* 510 (2d ed. 1977).

part of those billions to create a multi-billion trust fund for future Montana citizens. To date, it has succeeded in that intent. The potential for dissention and retaliation is manifest.

Quite apart from the facts of this particular case, there is a serious danger that other states will follow Montana's lead if the result below is permitted to stand. Montana is the frontrunner in adopting excessive severance taxes on coal, but many other states are mindful of this proceeding and will surely measure their taxing powers against the ultimate result here. Several states have come to Montana's defense, while many other states have publicly manifested opposition to the Montana tax.

The importance of these issues was further underscored when this Court granted a writ of certiorari in *Merrion* v. *Jicarilla Apache Tribe,* 617 F.2d 537 (10th Cir. 1980) (*en banc*), *cert. granted,* 49 U.S.L.W. 3208 (Oct. 6, 1980). That case raises, among other things, issues concerning the effect of the Commerce Clause on the power of Indian Tribes to adopt severance taxes on natural resources. On the pertinent point, the Tenth Circuit sustained the tax on reasoning similar to that of the Montana Supreme Court. *See* 617 F.2d at 545-46. The instant case arises, however, in a context having wider application, since it relates to the power of the states, and with far greater financial consequences.

For these reasons, this case raises substantial questions under the Commerce Clause on which this Court should rule.

II. A STATE TAX ON AN ACTIVITY WHICH "SUBSTANTIALLY AFFECTS" INTERSTATE COMMERCE, BUT IS NOT YET "IN" INTERSTATE COMMERCE, SHOULD BE EXAMINED UNDER THE COMMERCE CLAUSE.

The Montana Supreme Court arrived at its result principally through its construction of a series of cases decided by this Court in the 1920's and 1930's dealing with the Commerce Clause implications of taxation of mineral resources. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Gas Co.* v. *Hall*, 274 U.S. 284 (1927). Under those decisions, an activity not "in" commerce was said to be wholly outside the scope of the Commerce Clause.

Those decisions have not been reviewed directly in this Court for over fifty years and, in the words of a leading authority, now present "fertile soil for reconsideration . . . ." (Hellerstein, *supra*, at 254). They are, we submit, utterly inconsistent with constitutional doctrines adopted since that time which clearly recognize the Commerce Clause implications of acts which "substantially affect" interstate commerce whether they are "in" or "out" of such commerce. For this reason as well, the issues raised here are deserving of review by this Court.

The issue here is not, and never has been, whether the states have the power to tax the severance of natural resources to meet legitimate needs. Plaintiffs have consistently recognized that power. They fully recognize that wide latitude must be given to state legislatures to assess those needs and to fix appropriate means to raise revenues. Instead, the issue is whether the state's power is exclusive, absolute and free from any constraint under

the Commerce Clause, notwithstanding the actual or potential effects of the tax on interstate commerce.

Under the broad rationale of older cases—adopted and applied here by the Montana Supreme Court—all Commerce Clause questions could be decided by a "mechanical test" which was expressed most clearly in this Court's decision in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). There, the majority derived the following rule from *Heisler*, *Oliver Iron* and other like cases (pages 302-03):

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. *In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government.* (Emphasis supplied).

But this has not been the law since 1937.

This case presents a clear choice between the foregoing "mechanical test" and a modern test which requires the courts to examine the practical effect of activities, including state taxes, which "substantially affect" interstate commerce.

The Montana Supreme Court decided the case by applying the older rule, despite the fact that the law concerning the scope of the Commerce Clause has changed entirely in the last forty years. The rationale of *Heisler* and like cases has been altogether undermined

and the results of modern cases are completely irreconcilable with its rationale. *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1 (1937), clearly broke with the *Heisler* test. It held (page 37):

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

Wickard v. *Filburn*, 317 U.S. 111 (1942), underscored the departure from the earlier rule, extending the commerce power to those "activities in*tra*state which so affect interstate commerce . . . as to make regulation of them appropriate. . . ." *Id.* at 127. (Emphasis supplied). It made specific reference to *Heisler* and related cases as "earlier pronouncements" which no longer accurately reflected the law, even in 1942. *Id.* at 127, n. 21.

Since 1937, this Court has consistently held that activities which "substantially affect" interstate commerce raise Commerce Clause considerations of the same type as those activities which are "in" interstate commerce under the older rules. *E.g.*, *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 241-42 (1980); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). This is equally true when the Court has considered the "negative implications" of the Clause—*i.e.*, its restraints on the power of the states—as when it considered its affirmative grant of power to Congress. *E.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 100 Sup. Ct. 2009, 2016-17 (1980); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622-23 (1978). The claim that a state's tax or regulation only

affects a "local" or intrastate activity no longer serves to immunize it from Commerce Clause scrutiny. *E.g.*, *Nippert* v. *Richmond*, 327 U.S. 416, 424 (1946); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 140 (1970); *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 349-50 (1977). *See also Parker* v. *Brown*, 317 U.S. 341, 362 (1943).

The Montana Supreme Court did not dispute—and, in fact, tacitly conceded—that this Court's opinions over the years since 1937 have consistently rejected mechanical tests such as that employed in *Heisler* in favor of Commerce Clause tests looking to the practical "substantial effects" of particular activities on commerce. (Opinion 9-10; Apdx. 11a-12a). It merely held that the rationale of the modern cases had not yet been extended to the precise question of a state's power to tax natural resources and that it did not feel bound by "dicta" in other cases. It offered no express rationale for distinguishing those cases.

Such a distinction cannot be supported in principle. An artificial distinction between matters which are exclusively "federal" and those which are exclusively "local"—the precise distinction on which the court below premised its decision—could readily lead to retaliation of state against state and to a breakdown in the national economy.

For the foregoing reasons, the instant case squarely presents a fundamental question under the Commerce Clause which ought to be determined by this Court.

III. THE RESULT BELOW MISCONSTRUES RECENT DECISIONS OF THIS COURT ON IMPORTANT ISSUES CONCERNING THE CONSTITUTIONAL STANDARDS TO BE APPLIED TO STATE TAXES.

In the past decade, this Court has enunciated a series of principles relating to the power of states to tax activities which are in or affect interstate commerce. This effort has been directed at rationalization of constitutional principles along lines which give predominant weight to the practical effect of taxes, not to labels and artificial distinctions. *See Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 100 S. Ct. 1223, 1234 (1980), and cases cited.

Among other things, this Court has announced a substantive Commerce Clause test of general application to state taxes affecting interstate commerce. *See, e.g., Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). As most recently articulated, that test requires the Court to examine:

> the "practical effect" of the tax to determine whether it " 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.' "

Exxon Corp. v. *Wisc. Dep't of Rev.*, 100 S. Ct. 2109, 2122 (1980). The Montana Supreme Court readily assented to the expansion of state powers articulated in *Complete Auto* and like decisions (Opinion 13; Apdx. 15a-16a), but gave short shrift to these corresponding limitations. In addition to rejecting the claim that the Commerce Clause applies to a state severance tax, it also reached conclusions which raise important questions

concerning the appropriate construction of the "fairly related" and "discrimination" prongs of the foregoing Commerce Clause test.

1. The court below held that the "fairly related" branch of the foregoing test may be determined as a matter of law, without any factual inquiry, holding that the test was satisfied simply because Montana provided the benefits of government. (Opinion 19; Apdx. 22a).[15] This holding essentially writes the "fairly related" test out of the law, since every state provides governmental benefits of some type. If the test is to have any meaning at all, it must raise factual issues on which proof should be taken. Cases in this Court make clear that the test is factual. *E.g.*, *Washington Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 750-51 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). Cases in lower courts so state. *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 545 n.4 (10th Cir. 1980) (*en banc*), *cert. granted,* 49 U.S.L.W. 3208 (Oct. 6, 1980). *Budget-Rent-a-Car of Wash.* v. *Multnmah Cty.*, 287 Or. 93, 597 P.2d 1232, 1239 (1979). The contrary holding of the Supreme Court of Montana raises a serious Commerce Clause question which ought to be examined here.

2. The Montana Supreme Court discarded "the fair relation" test in another way, holding that it did not come into force unless a tax violates another prong of the test as well, *i.e.*, insufficient nexus or faulty apportionment. (Opinion 19; Apdx. 22a). There is no suggestion in the opinions of this Court that the "fair

---

15 In doing so, it rejected the reasoning of the trial court, which squarely held that if it reached this question, it "would necessarily have to deny the motion to dismiss and proceed to a factual determination. . . ." (District Court Order, dated July 27, 1979, at 5).

relation'' test does not stand on its own. The contrary holding of the Supreme Court of Montana raises another question which ought to be considered here.

3. The Montana Supreme Court did not expressly pass on plaintiffs' contentions that the tax was adopted because it would shift an extraordinary burden to other states and thereby discriminates against interstate commerce. This claim, too, raises a serious question which ought to be examined here. Hellerstein, *supra*, at 249.

* * * * *

Each of these questions is of importance, not only to clarify the law for the guidance of the lower courts, but also because each construction adopted by the Montana Supreme Court emasculates one of the Commerce Clause tests enunciated by this Court and thus frees the states from any practical constraint under those tests. In each instance, the construction given to the tests by the Montana Supreme Court leaves the state with unfettered power to tax. That is precisely the vice of the tax in issue here.

IV. THE BURDEN OF MONTANA'S SEVERANCE TAX IS "TAILORED" TO FALL ON RESIDENTS OF OTHER STATES AND THEREFORE DESERVES SPECIAL SCRUTINY.

Plaintiffs claim of discrimination is closely tied to another argument made by plaintiffs and rejected by the Montana Supreme Court. The Montana tax was manifestly "tailored'' to fall on interstate commerce and on out-of-state residents. The Montana legislature was fully aware that the burden of this tax would fall principally on non-residents. Towe, *Explanation of Reasons for Montana's Coal Tax* 4 (1976).

As this Court said in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 n.15 (1977):

> Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. See *Freeman* v. *Hewit*, 329 U.S., at 265-266, n. 13 (concurring opinion). *A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce.* (Emphasis supplied).

This case brings into sharp focus the danger posed by such taxes, for here the burden of the tax "is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind White Co.*, 309 U.S. 33, 46 n.2 (1940). In such circumstances, courts generally, and this Court in particular, have a special burden to apply rigorous standards of review. *Austin* v. *New Hampshire*, 420 U.S. 656, 662-63 (1975).

V. A STATE TAX WHICH SUBSTANTIALLY FRUSTRATES FEDERAL ENERGY POLICIES SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE.

In recent years, Congress has enacted a series of laws intended to implement a national policy designed to encourage the use and production of coal in lieu of oil and natural gas. In some cases, these statutes expressly or practically require electric utilities and certain industrial users to use coal instead of these scarcer fuels. *See, e.g.*, Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, and other

statutes cited at pages 1-2, *supra*. Although their legislative history makes it clear that these statutes were intended to encourage and foster the greater use of coal, the court below seized upon the fact that these federal laws do not specifically prohibit state severance taxes. The effect of the decision is to permit the Montana legislature to undermine important federal policies by increasing the cost of coal, while Congress is attempting to encourage its use.

The court below arrived at this result by ignoring the many decisions in this Court which establish that "any state legislation which frustrates the full effectiveness of federal law" or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is rendered invalid by the Supremacy Clause. *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Under the decided cases, a finding of substantial frustration may be based on an interference which is not apparent on the face of a statute. Indeed, on many occasions this Court has evaluated the practical effect of state laws on the implementation of federal policies, and has struck them down even though no direct conflict with federal law existed. *E.g.*, *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967); *Hill* v. *Florida*, 325 U.S. 538 (1945). *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977).

The effect of the decision below was to deprive plaintiffs of an opportunity to prove their claims. Plaintiffs were prepared to prove the extent to which implementation of the policies expressed in the cited statutes depends on production of coal from Montana and that the tax has already had, and will continue to

have, a substantial adverse effect on that production. Plaintiffs were prepared to proffer expert testimony (based on extensive studies and computations) designed to show (i) that without the tax, production of Montana coal would rise an additional 20 million tons annually by 1990, and (ii) because of the tax, planned mines in Montana have not opened, existing mines are operating below capacity, coal contracts have been cancelled, and new contracts for Montana coal have dropped off precipitously.

The decision below severely restricts the scope of the Supremacy Clause, by limiting the preemptive effect of federal laws to only those instances where a state law specifically and directly conflicts with a provision of a federal statute. This is not, and should not be, the law. In order for our national government to function effectively, it is imperative that the 50 individual states not be permitted to enact separate laws which have the practical effect of frustrating the effectiveness of federal law. Congress is not, and should not be, required to anticipate all of the myriad ways in which states may frustrate the effectiveness of its laws. Given the wide scope of federal legislation today, this would be an impossible task and would render the effectiveness of the Supremacy Clause a virtual nullity.

For the foregoing reasons, the instant case squarely presents fundamental questions under the Supremacy Clause which ought to be determined by this Court.

VI. A STATE TAX WHICH SUBSTANTIALLY FRUSTRATES THE FEDERAL STATUTORY DIVISION OF ROYALTIES FROM FEDERAL COAL DEPOSITS SHOULD BE HELD INVALID UNDER THE SUPREMACY CLAUSE.

The Montana Supreme Court also dismissed Count Three of the Complaint because, in its view, the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, did not specifically prohibit states from imposing severance taxes on federally-owned coal. (Opinion 31-33; Apdx. 37a-39a). In doing so, the court clearly overlooked, without discussion, important federal rights which were at the heart of that Act. Under the Act, federal interests in mineral deposits under western lands were retained by the federal government. It was determined that the national government would have the right to lease these mineral deposits and to receive revenues from them, subject to a division of royalties with the states in which the deposits were located. This is the essential compromise set out in the Act, a compromise reached after years of debate in Congress over proper disposition of these mineral rights.

By absorbing—or attempting to absorb—all of the "economic rents" on such coal in Montana, the severance tax will necessarily reduce the royalties and other revenues received by the federal government and thereby substantially frustrate the compromise which lies at the heart of the Act. It is not an answer to the foregoing that the Act recognized the right of states to impose severance taxes, without expressly limiting the amount of permissible taxation, because that proviso did not grant the states an unfettered right to impose severance taxes on federally-owned coal, but only permitted them to "exercise any rights which they may

have . . . ." 30 U.S.C. § 189. No state has ever had a right to tax to the extent that it substantially frustrates the effectiveness of federal law.

For the reasons previously discussed in connection with Count Two of the Complaint, the Montana Supreme Court's decision dismissing Count Three raises fundamental questions under the Supremacy Clause which should be reviewed by this Court.

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant Westmoreland Resources, Inc.

October, 1980

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants except Western Energy Company

APPENDIX

TABLE OF CONTENTS

Documents	PAGE
Opinion of the Supreme Court of Montana in *Commonwealth Edison Co., et al.* v. *State of Montana, et al.* and *Lake Superior District Power Co., et al.* v. *State of Montana, et al.*—July 17, 1980	1a
Notices of Appeal in the Supreme Court of Montana—October 2 and 6, 1980	41a
Complaint in *Commonwealth Edison Co., et al.* v. *State of Montana, et al.*—June 20, 1978	45a
Montana Statutes	
Montana Coal Severance Tax, §§ 15-35-101 *et seq.*, Montana Code Annotated (excerpts)	62a
Constitutional Provisions	
Article 1, § 8, cl. 3 of the United States Constitution	70a
Article VI, cl. 2 of the United States Constitution	70a
Federal Statutes	
Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, as amended, 42 U.S.C. 1857 *et seq.* (excerpts)	71a
Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (excerpts)	81a
Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 (excerpts)	83a

PAGE

Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (excerpts)..... 87a

Energy Research and Development Administration Act, Pub. L. No. 95-39, 91 Stat. 180 (excerpts) 92a

Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 (excerpts)..... 93a

Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (excerpts) .. 95a

Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, 88 Stat. 1878 (excerpts)..... 100a

Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 (excerpts)..... 103a

Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (excerpts) 111a

Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (excerpts) .. 115a

Opinion of the Supreme Court of Montana in *Commonwealth Edison Co., et al. v. State of Montana, et al.* and *Lake Superior District Power Co., et al.* v. *State of Montana, et al.*—July 17, 1980

IN THE

SUPREME COURT
OF THE STATE OF MONTANA

1980

COMMONWEALTH EDISON COMPANY *et al.*,

Plaintiffs and Appellants,

vs.

STATE OF MONTANA *et al.*,

Defendants and Respondents,

and

LAKE SUPERIOR DISTRICT POWER COMPANY, *et al.*,

Plaintiffs and Appellants,

vs.

STATE OF MONTANA *et al.*,

Defendants and Respondents.

Appeal from:
District Court of the First Judicial District,
Hon. Peter G. Meloy, District Court Judge

Counsel of Record:

For Appellants:

Hooks and Budewitz, Townsend, Montana
John Carl argued, Butte, Montana
Rogers and Wells, New York, N.Y.
William P. Rogers argued and William R. Glendon argued, New York, N.Y.

For Amicus Curiae:

Garrity, Keegan and Brown, Helena, Montana
Hon. Mark White argued, Attorney General, Austin, Texas

For Respondents:

Hon. Mike Greely, Attorney General, argued, Helena, Montana
Mike McGrath argued, Assistant Attorney General and Mike McCarter argued, Assistant Attorney General, Helena, Montana
Cannon and Gillespie, Helena, Montana
Ross Cannon argued, Helena, Montana

For Amicus Curiae:

Leo F. J. Wilking argued, Special Assistant Attorney General for State Tax Commissioner, Bismark, North Dakota

---

Submitted: April 21, 1980
Decided: July 17, 1980

Filed:

Thomas J. Kearney
Clerk

[2] Mr. Justice John C. Sheehy delivered the Opinion of the Court.

This is an appeal from a judgment of the District Court, First Judicial District, Lewis and Clark County, Montana, the Hon. Peter G. Meloy presiding, upholding the validity of Montana's coal severance tax.

Plaintiffs sought a declaratory judgment from the District Court that the tax unconstitutionally burdens interstate commerce, and unconstitutionally frustrates federal policy. Commonwealth Edison Company and its coplaintiffs brought one action for this purpose, and Lake Superior District Power Company and its coplaintiffs brought a second action. Because the issues are the same, the actions were consolidated.

The District Court granted defendants' motions to dismiss the complaints before trial, finding as a matter of law that they did not state claims upon which relief could be granted. Judgment was entered in each case in favor of the defendants and the plaintiffs appealed.

Since each case comes to us on appeal from a judgment of dismissal, we accept the facts which are well-pleaded in the complaints as true. This was the rule before we adopted the Montana Rules of Civil Procedure, *Heisler* v. *Severy* (1945), 117 Mont. 105, 111, 158 P.2d 501, 503, and is the rule now. However, conclusions of law in the pleadings need not be accepted by this Court as binding under a judgment on a motion to dismiss. Allegations of conclusions of law present no issuable facts. *Waite* v. *Standard Accident Insurance Co.* (1957), 132 Mont. 220, 315 P.2d 984. If therefore factual

issues exist which should have been considered by the District Court prior to granting judgment, the judgment [3] must be reversed. Conversely, if as a matter of law, under any view of the alleged facts, plaintiffs cannot prevail, affirmance of the District Court is commanded.

We have fully considered the contentions of plaintiffs on their appeal; we have examined the pleadings, and the grounds of the motion to dismiss; we have looked at the admitted factual matters which plaintiffs allege would invalidate the tax; and we have concluded from the whole record that the Montana Coal Severance Tax in its present form is a lawful exercise of Montana's taxing authority under our State and Federal Constitutions. Accordingly, we affirm the District Court.

Three issues were raised by plaintiffs for our review:

1. Is the coal severance tax impermissible under the Commerce Clause of the United States Constitution?

2. Is the coal severance tax impermissible under the Supremacy Clause of the United States Constitution as frustrating national policies and statutes?

3. Is the coal severance tax impermissible under the Supremacy Clause of the United States Constitution as frustrating national policies contained in the Mineral Lands Leasing Act of 1920?

THE TAX AND ITS HISTORY

In 1975 and 1977, the Montana Legislature amended its coal severance tax schedules, section 84-1314, R.C.M. 1947, now section 15-35-103, MCA. It now contains these provisions:

"15-35-103. *Severance tax—rates imposed—exemptions.* (1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:[4]

"Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
"Under 7,000	12 cents or 20% of value	5 cents or 3% of value
"7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
"8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
"Over 9,000	40 cents or 30% of value	12 cents or 4% of value

" 'Value' means the contract sales price.

"(2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

"(3) A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year."

No issue is raised here that there is an unconstitutional difference between the rate of taxes charged for strip-mining of coal and for underground mining of coal.

Prior to 1975, the Montana tax on strip-mined coal ranged from twelve to fourteen cents a ton, depending on BTU content. The 1975 amendment was a response to the meteoric increase in strip-mined coal entrepreneurs in the state in the 1970's. From the 1940's until the mid-1960's activity in coal strip-mining as well as in underground coal mining remained fairly dormant in the

state. The increase in gross tonnage produced since 1971 from strip-mining is demonstrated by the following figures taken from the records of the Montana Department of Revenue, of which we have taken judicial notice:

One Year	*Gross Tons*
1971	6,983,186
1972	8,224,118
1973	10,678,058
1974	14,116,625
1975	22,160,236
1976	26,347,923
1977	27,340,905
1978	26,516,481
1979	32,545,071

[5] In the general election of 1976 the Montana voters amended their state constitution by adding a new Section 5 to Article IX, 1972 Montana Constitution. In essence the constitutional addition provides that from and after December 31, 1979, at least fifty percent of the severance tax collected shall be dedicated to a trust fund, the principal of which is to remain inviolate unless appropriated by a vote of three-fourths of the members of each house of the legislature.

This Court notes in passing our impression that the 1975 coal severance tax provisions, and the 1976 constitutional amendment, were in part responses to the historical experience of Montana with respect to the inadequacy of earlier forms of taxes on mineral production. In 1965, the Hon. James Felt rose in the State House of Representatives to complain that the richest hill on earth (Butte) had paid not a dime in net

proceeds tax the previous year. Some modifications in computation agreed to by the mining company ameliorated that condition in subsequent years. Nevertheless, Montana's experience had shown that its mineral wealth could be exhausted and exported with little left in Montana to make up the loss of its irreplaceable resources. Montana has been painfully educated about the extreme economic jolts that follow when the mine runs out, the oil depletes, or the timber saws come still. We have a good many examples that teach us what happens to our hills when the riches of our Treasure State are spent. For these and other reasons, when strip coal mining was beginning to burgeon, in 1975, the legislature moved to fix a tax that would provide both for the present and the future when the coal deposits were gone.

Since the commencement of the instant actions, the plaintiffs have paid their coal severance taxes under protest. Were the coal severance tax found to be invalid, presently [6] some $87,000,000 and accrued interest in protested taxes should have to be returned by the State to the taxpaying producers, we were informed in oral argument.

EFFECT OF THE COMMERCE CLAUSE

Before we discuss the commerce clause contentions, we look at the relationship of the various plaintiffs to the coal tax which is being attacked. The true taxpayers before us in this case are the *producers* of the coal. The Montana coal severance tax is levied at the time the coal is separated by the producer from the realty in Montana,

and at its value when sold by the producer in Montana. Section 15-35-103, MCA. Thus in this case, only the coal producing plaintiffs are actually paying taxes, they being Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc., and Western Energy Company. The remaining plaintiffs are utilities to whom the producers, by contract or indirectly, may have passed on the coal severance tax as a part of the price of Montana coal. To contend that the utility plaintiffs are the true plaintiffs because by contract or indirectly they have assumed the coal severance taxes would seem also to argue that the coal producers have no real issue at stake here. Nevertheless the coal producers have the only vital stake in this case because they and not the utility companies are in fact the taxpayers. It is the producers to whom the protested taxes would be returned should the tax be found unlawful. In deciding this case therefore, we look to the status in Montana of the producing taxpayers to determine whether the coal, at the time it is severed by the producers, is subject to the present Montana state taxation.

The United States Constitution provides in Article I, Section 8, that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The principal contention of the plaintiffs in this case is that the holdings of the United States Supreme Court in *Heisler, Oliver Iron Co.,* and *Hope Gas Co., infra,* no longer have any force. The plaintiffs do not allow that Montana can tax a purely local event such as the severance of coal from a seam or deposit. They insist

that the commerce clause reaches even into the very severance of the coal, and that the only issue for the District Court to have decided here was whether the coal severance tax had impact enough to hamper or obstruct interstate commerce. The plaintiffs concede that the state can levy some tax, perhaps twelve and a half to fifteen percent of the value of the coal. Therefore, by inference, the plaintiffs contend that at some point not specified, between fifteen to thirty percent of the value of the coal, Montana's coal severance tax butts into the lintel of federal impermissibility.

In essence, the plaintiffs' argument under the commerce clause reduces to this: Montana has no inherent right to tax the intrastate severance of coal which may eventually enter interstate commerce except by federal sufferance; such sufferance ceases when the tax can be construed to hamper or obstruct commerce between the states.

The law on state taxation of production of goods, it seems to us, has been settled by the United States Supreme Court since the 1920's. Leading cases on manufacturing (*American Mfg. Co.* v. *St. Louis* (1919), 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084); producing (*Hope Gas Co.* v. *Hall* (1927), 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049); and extracting (*Oliver Iron Co.* v. *Lord* (1923), 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929); (*Heisler* v. *Thomas Colliery Co.* [8] (1922), 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237); established a common theme: production of personal property within a state is a local activity which precedes the entry of the property into interstate commerce, and is therefore subject to state regulation and taxation.

Yet we have found no United States Supreme Court case, and none has been cited to us, which implicitly or directly overthrows the rule that the several states have the reserved power to tax intrastate manufacturing, extraction, and production of goods. It is true that some cases have used language which *seems* to assail this reserved power. Notwithstanding, it must be concluded after an analysis of the cases bearing on the subject that the United States Supreme Court continues to recognize the taxing power of the states in these intrastate fields.

The plaintiffs' attack against the coal severance tax under the commerce clause is based upon the premise that the United States Supreme Court has moved away from its holdings in *Hope Gas Co., Oliver Iron Co.,* and *Heisler,* supra. The cases on which plaintiffs rely for this contention may be summarized as follows:

(1) *Labor Board* v. *Jones & Laughlin* (1937), 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, upholding the NLRA against a constitutional attack; *Wickard* v. *Filburn* (1942), 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, upholding a federal program of acreage allotments for wheat production; *Parker* v. *Brown* (1943), 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, which upheld a California state statute that fixed prices and restricted sales of raisins grown in California but which contains language seeming to reject the mechanical test of *Heisler; Freeman* v. *Hewit* (1946), 329 U.S. 249, 67 S.Ct. [9] 274, 91 L.Ed. 265, holding unconstitutional the application of an Indiana gross income tax act to the sales of securities by brokers in New York; the securities being assets of an Indiana estate, and incidentally, applying the commerce

clause to intangibles as well as to tangibles; *Nippert* v. *Richmond* (1946), 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760, striking down a municipal tax on solicitors in Richmond, Virginia; *Pike* v. *Bruce Church, Inc.* (1970), 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174, striking down an Arizona state regulation concerning the packing of cantaloupes grown in Arizona; *Hunt* v. *Washington Apple Advertising Comm'n.* (1977), 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383, striking down a North Carolina statute which prescribed the labeling of containers in which apples were to be sold in that state; *A.& P. Tea Co.* v. *Cottrell* (1976), 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55, holding unconstitutional the application of a Mississippi regulation that milk and milk products could be sold in Mississippi from another state only if the other state had reciprocal provisions for Mississippi milk, where a Louisiana producer was refused a permit from Mississippi; *Complete Auto Transit, Inc.* v. *Brady* (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, reh.den. 430 U.S. 976, which we will discuss more in detail hereafter; *Washington Rev. Dept.* v. *Stevedoring Assn.* (1978), 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682, also discussed hereafter.

Plaintiffs have cited a number of other cases, but their full recitation here would only be cumulative.

The District Court, in ruling on the motions to dismiss, determined that the cases relied on by the plaintiffs from the United States Supreme Court fell into four categories, which we here set forth together with some examples:[10]

(1) When Congress has asserted its regulatory powers under congressional acts. *Labor Board* v. *Jones & Laughlin, supra; Parker* v. *Brown, supra.*

(2) When the State engages in regulatory activity of interstate commerce. *Pike* v. *Bruce Church, Inc., supra; A. & P. Tea Co.* v. *Cottrell, supra.*

(3) When the state imposes a tax on interstate commerce activity. *Nippert* v. *Richmond, supra; Complete Auto Transit, Inc.* v. *Brady, supra.*

(4) When the state imposes a tax on an activity which is not in commerce. *Heisler* v. *Thomas Colliery Co., supra; Alaska* v. *Arctic Maid* (1961), 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed. 227.

The District Court determined that the coal severance tax in issue here fell into the fourth category. The District Court further found that the cases in the fourth category involved a local incident subject to the state's reserved power of taxation on goods which preceded their entry into interstate commerce. We agree.

It is fair judicial policy for us not to regard as controlling here dicta found in cases in which the United States Supreme Court has upheld the regulatory powers of Congress under the commerce acts. See, for example of dicta, *Labor Board* v. *Jones & Laughlin, supra; Parker* v. *Brown, supra.*

It is likewise fair judicial policy for us not to feel bound here by dicta found in cases involving states which have engaged in regulation of interstate commerce. Again, *see Pike* v. *Bruce Church, Inc., supra; Phila-*

delphia v. *New Jersey* (1978), 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475. Nor do we feel bound or controlled by dicta found in cases decided by the United States Supreme Court involving states [11] or municipalities which have imposed a tax on an interstate commerce activity. For example, *Nippert* v. *Richmond, supra; Complete Auto Transit, Inc.* v. *Brady, supra.* We rely instead on those cases where the United States Supreme Court has directly upheld state taxation of production, extraction or manufacturing.

While the plaintiffs have contended that the trend of the United States Supreme Court decisions has been to move away from the holdings in *Heisler, Oliver Iron Co.,* and *Hope Gas Co., supra,* we do not find that contention supported in cases involving state taxes. Indeed, if we can read the trend of the decisions, it has been the policy of the Supreme Court to open up and to allow, not to *prevent,* state taxation of *interstate commerce transactions.* What has occurred in those decisions is that the Supreme Court has moved away over the course of years from the "immunity per se" rule which prevented state taxation of interstate commerce, *LeLoupe* v. *Port of Mobile* (1887), 127 U.S. 640, 8 S.Ct. 1380, 32 L.Ed. 311, to a rule of accommodation which recognizes that interstate commerce, in utilizing the services and protections of a state is required to "pay its way". *See Western Live Stock* v. *Bureau* (1938), 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. For this reason the Supreme Court has upheld state taxation which intrudes upon interstate commerce but where there exist local incidents which justify state taxation nevertheless.

General Motors v. *Washington* (1964), 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430; *Norton Co.* v. *Dept. of Revenue* (1951), 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517. Local incidents which are severable from interstate commerce but occur within a state, such that multiple taxation by other states on the same activity is not a threat, provide a basis which has brought about the standards [12] announced by the Supreme Court in *Complete Auto Transit, Inc.* v. *Brady, supra,* to find constitutional permissibility for state taxes *on interstate commerce.*

A most recent case demonstrating the tendency of the United States Supreme Court to encourage and allow state taxation of interstate commerce can be found in *Exxon Corp.* v. *Wisconsin Dept. of Revenue* (1980), ____ U.S. ____, 100 S.Ct. 2109, ____ L.Ed.2d ____. Exxon had filed income tax returns in Wisconsin using a geographical system of accounting which reflected only its Wisconsin marketing operations and which showed a loss for each year, resulting in no taxes being due. Exxon kept its accoutns in three major functional departments: exploration, refining, and marketing. Transfers of products and supplies among the three functional departments were theoretically based on competitive prices. Exxon had no exploration, production or refining operations in Wisconsin in the taxable years in question. Only marketing in Wisconsin was carried on by Exxon. Nonetheless, Wisconsin treated Exxon as a unit, and apportioned its income in such manner that a tax was produced, for which Wisconsin made demand upon Exxon. The United States Supreme Court held that

Wisconsin was not prevented from applying its statutory apportionment formula to appellants' total income under the due process clause of the Fourteenth Amendment. It held that the unitary business principle was a proper basis for apportioning state income tax upon an interstate enterprise when its income can be reasonably related to the activities of the corporation within the taxing state. The Wisconsin tax was held valid even though its statutory apportionment formula indirectly taxed income derived from extraction or refinement of oil and gas located outside the state. The Supreme Court found nexus, proper [13] apportionment, and a rational relationship between the income attributed to the state and the interstate values of the enterprise. (*Compare Mont. Dept. of Rev.* v. *Am. Smelting & Refining* (1977), 173 Mont. 316, 567 P.2d 901.)

Mobile Oil Corp. v. *Com'r. of Taxes of Vermont* (1980), ____ U.S. ____, 100 S.Ct. 1223, 63 L.Ed. 510, likewise approved such apportionment, finding a nexus is established if the corporation avails itself of the substantial privilege of carrying on business within the state.

These recent cases buttress our statement that plaintiffs have misread the trend of the United States Supreme Court cases. That trend lies in the direction of allowing states to tax products in interstate commerce, once a nexus with the taxing state is established.

The intent and portent of the United States Supreme Court in these cases is not to overturn the holdings of *Heisler, Oliver Iron Co.,* and *Hope Gas Co., supra.* Indeed the Court has consistently recognized the vitality

of those holdings on production and extraction. In *Freeman* v. *Hewit, supra,* Justice Frankfurter expressed the distinction between permissible and prohibited taxes as follows:

> ". . . a seller State has various means of obtaining legitimate contribution to the cost of its government, without imposing a direct tax on interstate sales. While these permitted taxes may in an ultimate sense come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than 150 years has been the ward of the commerce clause." 329 U.S. at 256, 67 S.Ct. at 278, 91 L.Ed. 274.

In like manner, state taxation of manufacturing within a state has also been upheld, though manufacturing of goods destined for commerce may be thought to present a weaker case than the production or extraction of goods. *Adams Mfg. Co.* v. *Storen* (1938), 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365. [14]

The intent of the United States Supreme Court to preserve these fields for state taxation as preliminary to interstate commerce and within the reserved taxing powers of the states is manifest. In *Alaska* v. *Arctic Maid, supra,* for example, the court found that Alaska's taxing of the gathering and freezing of fish taken from Alaska's territorial waters by ships was a "preliminary local business", to be compared with *Oliver Iron Co., supra,* as its "first cousin"; this, even though the ships eventually took their frozen cargo directly from the sea

to the State of Washington for canning. From that evident intent of the Supreme Court, we find this portent: there is no indication by the United States Supreme Court that its historical judicial sanction of state taxation on production, extraction and manufacturing is in jeopardy.

Indeed, the very inference of such a threat in a Supreme Court opinion would have raised such a clamor that the case would be a benchmark. We find none, and can only conclude that the Supreme Court will be as consistent in this area in the future as it has been in the past.

See Federal Compress Co. v. *McLean* (1934), 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622; and *Chassaniol* v. *Greenwood* (1934), 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004; referred to with approval in *Pike* v. *Bruce Church, Inc., supra.* Also *Caskey Baking Co.* v. *Virginia* (1941), 313 U.S. 117, 61 S.Ct. 881, 85 L.Ed. 1223.

The importance of these reserved fields of taxation to the states cannot be overstated. The State of Texas, whose attorney general appears before us as amicus opposing Montana's tax, will realize $980 million in oil and gas production taxes this year. The State of Alaska has sufficient reveues from the severance of oil and gas within its borders that its [15] 1980 legislature, before its recent adjournment, provided $900 million in an inviolate trust, not unlike Montana's, from those revenues. Such examples of local taxes could be added to almost state by state. No more important case on the power of states to levy taxes can be imagined than is presented here. For if the *rate of tax* on a local activity,

as here, can be found to violate the commerce clause, then certainly the *amount of tax* raised by a state on a local activity is in the same jeopardy. Were we or the United States Supreme Court to reach that result, then we should see, in the words of the old spiritual that "the walls came a-tumblin' down."

Plaintiffs' attack here is another in a series that seeks to assail and overturn the recognized power of states in these regards. In *Bel Oil Corporation* v. *Roland* (1962), 242 La. 498, 137 So.2d 308, appeal dismissed 371 U.S. 2, the state court upheld the validity of a severance tax on the extraction of natural gas in Louisiana. In *Industrial Uranium Co.* v. *State Tax Commission* (1963), 95 Ariz. 130, 387 P.2d 1013, an Arizona privilege tax on mining was upheld. In *Post Oak Oil Company* v. *Oklahoma Tax Com'n.* (Okla. 1978), 575 P.2d 964, a state excise tax on the severance of natural gas in Oklahoma withstood a commerce clause attack. All of these courts relied, as we do, on the continued adherence by the United States Supreme Court to its steady course of sanction in these fields.

On the basis that the severance of coal here is a taxable event that precedes entry into interstate commerce, we rule without hesitation that plaintiffs cannot prevail on their claims under count I of their complaints, because Montana's coal severance tax does not violate the commerce clause. The severance of coal by mining is not an interstate activity. [16]

In oral argument, the plaintiffs asked us to give them a straight up-and-down decision on whether the coal severance tax was governed by the commerce clause. We

have done that in the foregoing paragraphs. However, we feel compelled to remark that even if the commerce clause in this case obtained, plaintiffs could not have prevailed and the motion dismissing the complaints would have been properly granted in any event.

In making their commerce clause argument, the plaintiffs have contended that we were bound to apply the tests set forth in *Complete Auto Transit, Inc., supra.* In that case, the United States Supreme Court considered the constitutionality of a Mississippi tax on the "privilege of doing business in that state." The earlier case of *Spector Motor Service* v. *O'Connor* (1951), 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573, had adopted a formalistic test to the effect that taxes on the "privilege" of doing interstate business violated the commerce clause. The United States Supreme Court in *Complete Auto Transit, Inc.* overruled *Spector* stating that state taxes affecting interstate commerce must be viewed as to their practical effect and must be examined in light of a four-pronged test of that practical effect:

(1) Whether the tax is applied to an activity with a substantial nexus with the taxing state,

(2) Whether it is fairly apportioned,

(3) Whether the tax does not discriminate against interstate commerce and,

(4) Whether the tax is fairly related to the services provided by the state. 430 U.S. at 277-8, 97 S.Ct. at 1078, 51 L.Ed.2d at 330.

Washington Rev. Dept. v. *Stevedoring Assn., supra,* [17] upheld this four-pronged test and further recognized

that a state had a significant interest in exacting *from interstate commerce* its fair share of the cost of state government. 435 U.S. at 748, 98 S.Ct. at 1398, 55 L.Ed.2d at 695.

Complete Auto Transit, Inc. is a good example of our earlier assertion that the United States Supreme Court, instead of intruding upon the reserved fields of taxation allowed the state on local activities, has been moving toward a permissive or accomodating position allowing state taxation of interstate commerce under certain conditions.

Applying the *Complete Auto Transit, Inc.* four-pronged test, for the sake of argument, to the case at bar, plaintiffs could not prevail as a matter of law. Surely there can be no argument here that a substantial, in fact, the only nexus of the severance of coal is established in Montana. There can be no discussion of apportionment, because the severance can occur in no other state. There is no danger of multiple taxation, for no other state can tax the severance. *See, Chassaniol, supra; compare, Mich.-Wis. Pipeline Co.* v. *Calvert* (1954), 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583.

There would remain, if *Complete Auto Transit, Inc.* applied, only the fourth test, whether the tax is fairly related to the services provided by the state.

The taxpayers here, the coal producers, have the right to and the availability of all the governmental comforts and protection which this state provides. Since the United States Supreme Court is tending toward the position that interstate commerce must pay its way in the

respective states affected thereby, it is with logic of great force that Montana can require strip-coal mining to assume its just share for the cost of the state government that it [18] enjoys, and for the governmental cost that has occurred, is now occurring, and will in the future occur as the direct result of such strip-coal mining. Here Montana meets the test set out in *General Motors v. Washington, supra,* 377 U.S. at 441, 84 S.Ct. at 1568, 12 L.Ed.2d at 435:

> "For our purposes the decisive issue turns on the operating incidents of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the state and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . ."

It is impossible for any court to foot up the dollar cost of the governmental benefits received and to be received by the taxpayers here. Aptly the state points out the heart of plaintiffs' complaint is the *rate* of the tax. The state further contends that no United States Supreme Court opinion invalidating a state levy has turned on the rate of a tax. No summation of the cost of governmental benefits has ever been required by any court in determining the validity of a rate of levy in a general excise, property or income tax imposed by a state. It is said:

> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the

> taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes . . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the public good." Carmichael v. Southern Coal Co. (1937), 301 U.S. 495, 522-523, 57 S.Ct. 868, 878-879, 81 L.Ed. 1245, 1260-1261.

The rate of tax is a determination for the legislature to make, not a court. Montana's legislature has determined that its coal severance tax is fairly related to the governmental services Montana provides, and to the benefits of a trained [19] work force and the advantages of a civilized society. *See, Japan Line, Ltd.* v. *County of Los Angeles* (1979), 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336; *Washington Rev. Dept.* v. *Stevedoring Assn., supra.* We are not talking here about "user" charges or like fees imposed for the use of state facilities where the charge for the service must bear some fair relation to the service or property provided for use. Such "user" charges are capable of being determined. *See Evansville Airport* v. *Delta Airlines* (1972), 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620. Taxes as here imposed for the general support of the government are fairly related to that purpose by the mere fact that a government is thereby maintained. It is only when the taxpayer has an insufficient nexus to the taxing state, or

the tax is disproportionate to the incidents of commerce being taxed, that the fair-relation test applies. *See, e.g. National Bellas Hess, Inc.* v. *Dept. of Revenue* (1967), 386 U.S. 753, 756, 758, 87 S.Ct. 1389, 18 L.Ed.2d 505.

Complete Auto Transit, Inc., is intended to apply to situations where a state or local taxing authority adopts a tax that intrudes upon, hampers or obstructs in some fashion interstate commerce. It has no application in this case to the intrastate severance of coal by mining. But even if *Compete Auto Transit, Inc.* applied, as we have shown, plaintiffs could not prevail here as a matter of law.

We note that a tax of thirty percent of the coal's value at the time of its severance is not any indication of the impact of the severance tax as to the cost of coal at its final destination, in-state of out-of-state. The attorney general of Texas, appearing here as amicus, informed us in oral argument that Montana coal destined for Texas is now [20] purchased at $7 per ton at the mine, resulting in a severance tax in Montana of $2.10 per ton; however, the coal at destination in Texas cost $30 per ton. Most of the added price comes from the cost of transportation of the coal to Texas, which costs, the attorney general informed us, have increased from $8 per ton to $20 per ton in a short time. Demonstrably therefore, as to Texas, the interstate impact of the Montana coal severance tax is no greater than that of federal and state taxes on gasoline at the pump (before the recent price increases) or the state and city sales taxes on goods and services found in most localities. On the same tack, when we consider the customers of the utilities who are appearing

in this case, it is obvious without argument or proof that coal costs are only a portion of total generating costs of electricity. Although plaintiffs have contended that Montana's coal tax is passed on to the utility consumers, it must be admitted that this is because of the particular terms of the coal contracts of purchase entered into by the utility-plaintiffs. It would be strange indeed if the legality of a tax could be made to depend on the vagaries of the terms of contracts. We do not assume that in the broad picture all of the Montana coal tax is passed on to consumers because Montana does not have a monopoly in the production of coal. Montana coal must compete in the market with coal produced in Wyoming, North Dakota, and other sources of supply. Under those circumstances, economic factors will determine whether the producers will shoulder all or part of the tax, or pass it on in the form of increased prices.

The argument therefore that Montana is "exporting its coal tax" to out-of-state users has no more force in reality [21] when applied to Montana coal than to any other type of lawful tax on goods or products eventually moving in interstate commerce. Certainly, taxes paid on goods and products from origin to the eventual consumer are a factor in the final price to the consumer; that is an economic fact of our lives. In that sense, every state or locality that levies a tax on goods or products originating therein or manufactured therein is exporting its tax. No sane rule of law can or should be developed that would make a local tax illegal solely because it is a factor in the cost the eventual consumer pays. Such a rule would make state government taxation of goods and products a judicial morass.

It is for these reasons that we have determined, as we have stated earlier, to look at the status of the true taxpayers in this case, the producers of the coal. The Montana severance tax is levied at the time the coal is separated by the producer from the realty in Montana at its value when sold in Montana. In that light we have no difficulty in finding that Montana has the power as a state to tax the severance of coal within its borders. Plaintiffs contended in oral argument that because the coal bought by the utilities from the producers was already under contract for sale when mined, that the instant the coal was severed, it was in interstate commerce. We do not have to address that argument because the taxable event, as far as Montana is concerned is the act of severance itself. The event of severance necessarily precedes the instant when the coal ceases to be part of the realty and becomes part of the mass personality in Montana. We are not required here to determine whether the mined coal should not be considered a part of interstate commerce until the moment when the producer hands the coal over to the buyer, or its transporter [22] for the account of the buyer. There is no need to concern ourselves with such fine points here. The severance itself is a taxable event and the Montana statutes here tax that event in advance of any entry of the coal into commerce. In other words, the coal is produced and that production is taxed. Montana's coal severance tax is therefore ahead of and preliminary to the sweep of the power of Congress to regulate commerce. If this be not so, Montana and all other states would have to concede that any power of a state to tax the production of products which may

eventually enter into interstate commerce is at the whim or forbearance of the federal government. Neither the United States Supreme Court nor any other court has so held, and well enough, for such a decision would shatter the shield of judicially-approved states' rights in this field.

When it is realized that the coal producing plaintiffs are the real and only taxpayers of the Montana tax, the "exported tax" theory falls. With it falls the notion that there is no political check on the Montana legislature to limit the tax. Experience shows the producer plaintiffs are a vigorous presence at any session of the Montana legislature. Records of the Montana Secretary of State, of which we take judicial notice, Rule 202(b), M.R.Evid., show the number of lobbyists registered for the coal industry in recent sessions, sections 5-7-103 and 5-7-201, MCA, and their participation before legislative committees on matters affecting the coal industry.

Finally, with respect to the commerce clause, plaintiffs have continued to assert an argument which does not raise a substantive issue or one material to our decision in this case, but nonetheless requires a comment lest our silence be considered an admission of its substance. [23]

The nonissue raised by plaintiffs is that since a good deal of the coal being mined by plaintiffs or potentially to be mined (in oral argument it was said 75% of the coal) underlies federal leases, this coal therefore is not Montana's "birthright" but belongs to the nation as a whole. The argument is intended to have us believe that Montana is taxing here not the coal producers, but the people of the United States themselves.

Montana, in common with many of the states, has a substantial portion of its surface area under federal ownership. In addition, the federal government reserved to itself coal and other minerals in many of its patents or deeds of grant. We assume this situation gives rise to the nonissue raised by the plaintiffs.

Plaintiffs' argument is addressed to emotion and not to law. As long as the federal coal remains in deposit under federal ownership, it is "our" coal in the sense that it belongs to the people through the federal government. Once mined under a federal lease or permit, title to the coal is vested as personal property in the lessee or permittee as soon as it is mined and removed from its original place, subject only the royalty rights of the lessor, *Olson* v. *Pedersen* (1975), 194 Neb. 159, 231 N.W.2d 310, the same as with oil and gas. *De Mik* v. *Cargill* (Okla. 1971), 485 P.2d 229. Montana may impose taxes on the private lessees of federal lands. 30 U.S.C. § 189; *Oklahoma Tax Comm'n.* v. *Texas Co.* (1949), 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721; reh.den. (1949), 336 U.S. 958, 69 S.Ct. 887, 93 L.Ed. 1111.

The coal being taxed here therefore is not "our" coal, but the personal property of the plaintiffs who produced it under lease or permit. When the coal is mined, the federal government is in no different position as a lessor than a private lessor who grants a mining lease or permit. [24]

THE SUPREMACY CLAUSE

"This [federal] Constitution and the Laws of the United States which shall be made in Pursuance

thereof," states U.S. CONST., Art. VI, Cl. 2, ". . . shall be the supreme Law of the Land . . . ."

Here plaintiffs contend that Montana's coal severance tax is preempted because it "frustrates and impairs" implementation of federal policy; that the District Court misconceived the national policies involved here; that the overall national energy policy is to encourage a greatly expanded production and use of western coal; and that the question of substantial frustration is one of fact which cannot be determined on the pleadings.

Montana responds that the plaintiffs have failed to allege or to identify any "Laws of the United States" which the coal severance tax could frustrate or impair; and that the general policy considerations and goals alleged by plaintiffs are not "laws of the United States" which are declared to be the "supreme Law of the Land."

The motion to dismiss made by the State in the District Court challenged the legal sufficiency of the supremacy clause claim of the plaintiffs.

It is conceded by the plaintiffs that Congress has not expressly preempted or limited the authority of the State to levy the coal severance tax, nor "clearly and unmistakably" required the conclusion that Congress intended to prohibit or limit the tax. Rather the plaintiffs contend, as their complaints allege:

> "32. That the coal severance tax, on its face, and as applied, substantially frustrates and impairs fulfillment of national policies and purposes of certain acts of Congress." (App. 27) [25]

Under this argument plaintiffs contend that proof of "substantial frustration" does not require plaintiffs to show a specific Congressional intent to preempt the field (Pl. Brief at 60).

In fine, plaintiffs have contended that it is not the tax, but the *rate of the tax* which constitutes an obstacle to federal policy and which requires a determination of fact as to whether such obstacle exists.

By their argument, plaintiffs seek to bring themselves within the coverage of statements made by the United States Supreme Court in *Ray* v. *Atlantic Richfield Co.* (1978), 435 U.S. 151, 158, 98 S.Ct. 988, 55 L.Ed.2d 179; *Jones* v. *Rath Packing Company* (1977), 430 U.S. 519, 525-526, 97 S.Ct. 1305, 51 L.Ed.2d 604; reh.den. (1977), 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240; *De Canas* v. *Bica* (1976), 424 U.S. 351, 357 n. 5, 96 S.Ct. 933, 47 L.Ed.2d 43; and *Perez* v. *Campbell* (1971), 402 U.S. 637, 652, 91 S.Ct. 1704, 29 L.Ed.2d 233. Plaintiffs claim to be inheritors of the decision in *M'Culloch* v. *Maryland* (1819), 17 U.S. 415 (4 Wheat. 316), 4 L.Ed. 579.

In making its determination on the preemption issue, the District Court examined the following acts of Congress submitted or cited to the District Court as acts which defined the federal policies in the field:

> Powerplant and Industrial Fuel Use Act of 1978 Pub. Law No. 95-620, 92 Stat. 3289
>
> Natural Gas Policy Act of 1978 Pub. Law No. 95-621, 92 Stat. 3351
>
> Energy Conservation and Production Act Pub. Law No. 94-385, 90 Stat. 1125

Energy Policy and Conservation Act Pub. Law No. 94-163, 89 Stat. 871

Federal Nonnuclear Energy Research and Development Act of 1974 Pub. Law No. 93-577, 88 Stat. 1878 [26]

Energy Reorganization Act of 1974 Pub. Law No. 93-438, 88 Stat. 1233

Energy Supply and Environmental Coordination Act of 1974, Pub. Law No. 93-319, 88 Stat. 246

Emergency Petroleum Allocation Act of 1973, Pub. Law No. 93-159, 87 Stat. 627

Clean Air Amendments of 1970 Pub. Law No. 91-604, 84 Stat. 1676

From those acts, the District Court determined that there was a national policy to provide incentives to increase the use of other sources of energy, including coal, so as to decrease our dependence on oil. The District Court also determined from those acts, and from the cases it examined relating the subject, that "Congress has not and did not intend to preclude the State of Montana from imposing a tax on mining activities within the State. . ." App. at 240. It is in this conclusion of law that the plaintiffs now contend on appeal that the District Court erred: The plaintiffs do not claim that the federal acts submitted to the District Court establish a national policy which prevents Montana from levying *some* tax on the severance of coal. Instead, plaintiffs contend that the District Court should have allowed a factual hearing to determine whether the *rate* of

Montana's coal severance tax substantially frustrates national policy; and that the order of the District Court precluded plaintiffs from proving what the national energy policy was.

Some seventy or eighty years ago it used to be argued that the Constitution of the United States followed the flag. Here, plaintiffs in reality are contending that the Constitution follows the Dow-Jones average.

In examining the whole of the District Court's memorandum in support of its order, we think it implicit in the District Court's opinion not only that Montana is not prohibited [27] by federal enactments and policy from levying a coal severance tax but also that the amount of Montana's coal severance tax is not prohibited. In any event, we find the latter conclusion is a necessary result as a matter of law under the preemption argument.

Out of the welter of cases which has been cited to us on this issue by the parties, we, upon examination of such authorities, find it safe to say that no state excise tax has ever been struck down unless it had clearly conflicted with an act of Congress in the field *(M'Culloch* v. *Maryland, supra);* and likewise, that no state excise tax is likely to be held by the United States Supreme Court to be *limited* as to its *amount* unless it is expressly or by necessary implication shown to be prohibited or that the amount interferes with a power assumed or delegated to the United States.

The essence of the rule upon which we rely here, and of the rule which we think inheres in any of the United

States Supreme Court decisions on the subject is set out in *Penn Dairies* v. *Milk Control Comm'n.* (1943), 318 U.S. 261, 275, 63 S.Ct. 617, 623-24, 87 L.Ed. 748, 756-57:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States v. Borden Co,* 308 U.S. 188, 198-9; *United States v. Jackson,* 302 U.S. 628, 631; *Posadas v. National City Bank,* 296 U.S. 497, 503-5, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.
>
> ". . . Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." [28]

The mere statement by the plaintiffs that the Montana coal severance tax substantially frustrates a national policy for the use of western coal is not a sufficient basis to trigger a factual determination in the District Court.

The scope and substance of national policy are matters of statutory interpretation. This is a matter of law not requiring the taking of testimony. Again, of course, for purposes of a motion to dismiss, a District Court is not required to accept plaintiffs allegations of law and legal conclusions as true. *Newport News Co.* v. *Schauffler* (1938), 303 U.S. 54, 58 S.Ct. 466, 82 L.Ed. 646; *Mitchell* v. *Archibald and Kendall, Inc.* (7th Cir. 1978), 573 F.2d 429, 432; *Kadar Corporation* v. *Milbury* (1st Cir. 1977), 549 F.2d 230, 233; *Blackburn* v. *Fisk University* (6th Cir. 1971), 443 F.2d 121, 124.

Whether we agree here with plaintiffs that the decision of the District Court was only to the effect that no federal enactments prohibited *any* coal tax is of no moment. The reason for the district judge making that finding was that he could find no federal enactment of specific policy with respect to which the Montana coal severance tax conflicted. For the same reason, when we examine plaintiffs' contention that the amount of the tax constitutes a substantial frustration of federal policy, that argument must also fall because of plaintiffs' failure to establish a federal enactment with which the amount of Montana tax conflicts or which is substantially frustrated.

We find ourselves in agreement with the District Court that the federal statutes cited do not establish domestic energy policies wherein Congress intended to nullify other national, state, local or individual policies or interests which may increase the cost of coal production in use. [29] Stated another way, we do not find a national domestic energy policy or congressional enactments predicated upon a Montana coal severance tax of

fifteen percent or less. Indeed, the federal enactments point in other directions. There are incentives for the development of underground coal mines. 42 U.S.C. § 6211. There is a provision for export restrictions. 42 U.S.C. § 6212. Miners of low sulfur coal are not exempted from costly environmental strip mining regulations. 30 U.S.C. § 1251, et seq. Health and safety requirements are enforced upon strip coal miners. 30 U.S.C. § 801, et seq. Royalties on federal lands are payable under the Mineral Lands Leasing Act of 1920 as amended. 30 U.S.C. § 181, et seq. Congress seems to prefer underground coal mining. 30 U.S.C. § 1201, et seq. As the District Court found, to the distaste of the plaintiffs, Congress favors and encourages the production and use of high sulfur eastern and midwestern coal, rather than low sulfur western coal, the latter of which is to be used principally by existing facilities for which technological upgrading of air pollution control equipment is impractical or not feasible. 42 U.S.C. §§ 7411 and 7425. Indeed, § 7411, as amended in 1977, requires users of low sulfur coal nevertheless to install the "best technological system of continuous emission reduction" required for all stationary sources, even though such systems may be unnecessary because the low-sulfur coal meets the emission standards. *See,* U.S. Code Congressional and Administrative News, 95th Congress, 1977 Session, Vol. II, at 1245. Congress would rather that eastern and midwestern plants used "local coal," even coal with higher sulfur content than western low-sulfur coal.

How then can any court determine that the effect of Montana's coal severance tax is to frustrate national

policy, [30] when no national policy can be discerned as a matter of law?

The federal constitutional prohibition, under the supremacy clause, is against state laws which contravene "the laws of the United States which shall be made in pursuance of [the federal constitution]." What is wanting in plaintiffs' argument is *any* federal enactment, constitutionally adopted, which is clearly, substantially frustrated by Montana's coal severance tax.

The taxing power of the state is an essential power of its sovereignty. *Weston* v. *City Council of Charleston* (1829), 27 U.S. 171, 174 (2 Peters 449), 7 L.Ed. 481. This power cannot be set aside or limited on weightless statements that a federal policy is being substantially frustrated.

Contrary to the contention of plaintiffs, *De Canas* v. *Bica, supra,* was not sent back by the Supreme Court for a factual determination, but rather for a construction by the California courts of California statutory law. *De Canas* v. *Bica, supra,* 424 U.S. at 363-364, 96 S.Ct. at 940, 47 L.Ed.2d at 53-54. In *Exxon Corp.* v. *Governor of Maryland* (1978), 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91, reh.den. 439 U.S. 884, the United States Supreme Court rejected a contention that a broad general national policy can preempt state laws which have some indirect effect upon national policy. The court said in *Exxon*:

> "Appellants point out . . . the . . . basic national policy favoring free competition, and argue that the Maryland statute 'undermine[s]' the competitive balance that Congress struck between the Robinson-

> Patman and Sherman Acts. This is just another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our 'charter of economic liberty.' Northern Pacific R. Co. v. United States, 356 U.S. 1, 4. Nevertheless, [31] this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to pre-empt the power of the Maryland Legislature to enact this law." 437 U.S. at 133-134, 98 S.Ct. at 2217-2218, 57 L.Ed.2d at 104-105.

Again, under this preemption contention, a large number of cases are cited by the parties. Recitation of their holdings and effect would be cumulative here. Plaintiffs have attacked the decision of the District Court upon the ground that no court case was relied on by it to find that Montana's coal severance tax did not contradict a federal national policy. On this point, plaintiffs are stoking the same furnace as did the District Court. Plaintiffs have led us to no decision invalidating a state excise tax based on its rate as in contravention of federal policy.

We conclude that from any viewpoint, whether as a question of the power of the State of Montana to levy

any tax, or its power to levy a tax at the rate here set forth, there has been no preemption by the federal government in the field of coal severance taxation, or any national policy derived from Congressional enactments pursuant to the Constitution with which the Montana coal severance tax is in conflict.

THE FEDERAL MINERAL LANDS LEASING ACT OF 1920

Here, plaintiffs assert that the severance tax violates the Supremacy Clause of the United States Constitution on the ground that the tax grossly distorts the "compromise" between the federal government and the states expressed in the Mineral Lands Leasing Act of 1920, Chapter 85, 41 Stat. 437, as amended by the Federal Coal Leasing Amendments Act of 1975, Pub. Law No. 94-377, 90 Stat. 1083. [32]

Plaintiffs contend the federal legislation is a result of a longstanding debate concerning the ownership, disposition and use of federally owned mineral reserves in the western territories and states. The result, claim plaintiffs, is that the federal government retained the minerals for the people of the nation, subject to the payment of a share of the mineral royalties to the states in which the minerals were located.

Under the Act of 1920, as amended, fifty percent of amounts received by the federal government from sales, bonuses, royalties and rental of public lands thereunder are returned to the respective states wherein the leased lands or deposits are located, for uses specified in the Act. Plaintiffs claim Montana is without power, because

it substantially frustrates national policy, to tax the "economic rents" remaining over and above the rents and royalty payments. "Economic rents" are defined as the difference between the costs of production, including an acceptable profit, and the price which the products could obtain in the market place. Plaintiffs state that Montana has appropriated the "economic rents", which plaintiffs find to be a fundamental frustration of federal policy.

Here again, plaintiffs argue that they are not required to show an express prohibition under federal law; rather they contend that substantial frustration of the fulfillment of national policy is sufficient to render the state law unconstitutional under the supremacy clause.

The principal factor militating against plaintiffs' position on this part of their complaint is that Congress specifically allowed state taxation under the Mineral Lands Leasing Act of 1920. The Act contains this provision (30 U.S.C. § 189): [33]

> ". . . Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

If indeed, a "compromise" was reached with respect to the leasing of federally-owned mineral interests in public lands, that compromise included, under 30 U.S.C. § 189, the right of states to tax the "output of mines".

This indeed is a clear expression of federal policy and Montana's coal severance tax is within that policy.

In *Mid-northern Oil Co.* v. *Montana* (1925), 268 U.S. 45, 45 S.Ct. 440, 69 L.Ed. 841, *affirming Mid-northern Oil Co.* v. *Walker* (1922), 65 Mont. 414, 211 P. 353, the Supreme Court said:

> ". . . [A]lthough the act deals with the letting of public lands and the relations of the government to the lessees thereof, nothing in it shall be so construed as to affect the rights of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned." 268 U.S. at 49, 45 S.Ct. at 441, 69 L.Ed. at 843.

The Supreme Court also said:

> "No doubt, what Congress immediately had in mind was the necessity of making it clear that, notwithstanding the interest of the government in leased lands, the rights of the states to tax improvements thereon and output thereof should not be in doubt. . . . We think the proviso plainly discloses the intention of Congress that persons in corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." 268 U.S. at 50, 45 S.Ct. at 441, 169 L.Ed. at 843.

Again the District Court was correct in dismissing plaintiffs complaints under count 3 as a matter of law, for no justiciable controversy is presented by such count.

CONCLUSION

The judgment of the District Court in dismissing the plaintiffs complaints is affirmed.

John C. Sheehy
Justice

We Concur:

Frank I. Haswell
Chief Justice

Gene B. Daly

John Conway Harrison

Daniel J. Shea
Justices

Notice of Appeal in the Supreme Court of Montana—October 2, 1980

IN THE
SUPREME COURT
OF THE STATE OF MONTANA
No. 14982

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY and WESTMORELAND RESOURCES, INC.,

Plaintiffs-Appellants,

—VS—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

LAKE SUPERIOR DISTRICT POWER COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, and WESTERN ENERGY COMPANY,

Plaintiffs-Appellants,

Notice of Appeal

—vs—

STATE OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that each and all of the Plaintiffs and Appellants above-named, except Western Energy Company, hereby appeals to the Supreme Court of the United States from that final decision of the Supreme Court of the State of Montana, rendered [2] on July 17, 1980, affirming the decision and order of the Lower Court dismissing plaintiffs' claims against the defendants.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Dated this 2nd day of October, 1980.

ROGERS & WELLS
200 Park Avenue
New York, N.Y. 10017

HOOKS & BUDEWITZ
218 Broadway
Townsend, MT 59644

BY /s/ Patrick F. Hooks

Of Counsel
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Notice of Appeal in the Supreme Court of Montana—October 6, 1980

IN THE
SUPREME COURT
OF THE STATE OF MONTANA
No. 14982

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY and WESTMORELAND RESOURCES, INC.,

Plaintiffs-Appellants,

—VS—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

LAKE SUPERIOR DISTRICT POWER COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, and WESTERN ENERGY COMPANY,

Plaintiffs-Appellants,

—vs—

STATE OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the Plaintiff and Appellant above-named, Western Energy Company, hereby appeals to the Supreme Court of the United States from that final decision of the Supreme Court of the State of Montana, rendered on July 17, 1980, affirming the decision and order of the Lower Court dismissing Plaintiffs' claims against the Defendants. [2]

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

DATED this 6th day of October, 1980.

/s/ JOHN CARL

JOHN CARL
40 East Broadway Street
Butte, Montana 59701
Attorney for Western Energy Company

Of Counsel

DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Complaint in *Commonwealth Edison Co., et al.* v. *State of Montana, et al.*—June 20, 1978

IN THE

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF LEWIS AND CLARK

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, and WESTMORELAND RESOURCES,

Plaintiffs,

—against—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, RAY DORE, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and VERA S. FRESEMAN, STATE TREASURER,

Defendants.

COMPLAINT FOR REFUND OF TAXES PAID UNDER PROTEST AND FOR DECLARATORY AND INJUNCTIVE RELIEF

Complaint in Commonwealth Edison Co., et al. v. State of Montana, et al.—June 20, 1978

Plaintiffs, by their undersigned attorneys, allege the following causes of action against defendants State of Montana ("Montana"), Thomas L. Judge, individually and as Governor of the State of Montana ("Judge"), Ray Dore, individually and as Director of the State Department of Revenue ("Dore"), and Vera S. Freseman, individually and as State Treasurer ("Freseman").

PARTIES

[2]1. Utility Plaintiffs. The following plaintiffs are sometimes hereinafter referred to as "Utility Plaintiffs":

1.1 Commonwealth Edison Company ("Commonwealth Edison") is a corporation organized and existing pursuant to the laws of the State of Illinois.

1.2 Central Illinois Light Company ("Central Illinois Light"), is a corporation organized and existing pursuant to the laws of the State of Illinois.

1.3 Dairyland Power Cooperative ("Dairyland") is a cooperative organized and existing pursuant to the laws of the State of Wisconsin.

1.4 Detroit Edison Company ("Detroit Edison") is a corporation organized and existing pursuant to the laws of the States of New York and Michigan.

1.5 Interstate Power Company ("Interstate") is a corporation organized and existing pursuant to the laws of the State of Delaware.

1.6 Lake Superior District Power Company ("Lake Superior") is a corporation organized and existing pursuant to the laws of the State of Wisconsin.

Complaint in Commonwealth Edison Co., et al. v. State of Montana, et al.—June 20, 1978

1.7 Lower Colorado River Authority ("LCRA")/ City of Austin ("Austin") is a joint venture of LCRA, an agency of the State of Texas, and Austin, an incorporated municipality organized and existing pursuant to the laws of the State of Texas.

1.8 Minnesota Power & Light Company ("Minnesota P&L") is a corporation organized and existing pursuant to the laws of the State of Minnesota.

[3] 1.9 Northern States Power Company ("Northern States") is a corporation organized and existing pursuant to the laws of the State of Minnesota.

1.10 Upper Peninsula Generating Company ("Upper Peninsula") is a corporation organized and existing pursuant to the laws of the State of Michigan.

1.11 Wisconsin Power & Light Company ("Wisconsin P&L") is a corporation organized and existing pursuant to the laws of the State of Wisconsin.

2. Coal Producing Plaintiffs. The following plaintiffs are sometimes hereinafter referred to as "Coal Producing Plaintiffs":

2.1 Decker Coal Company ("Decker") is a joint venture company with principal offices at Sheridan, Wyoming. Its joint venturers are Wytana, Inc., a corporation organized and existing pursuant to the laws of the State of Delaware, and Western Minerals, Inc., a corporation organized and existing pursuant to the laws of the State of Oregon.

2.2 Peabody Coal Company ("Peabody") is a corporation organized and existing pursuant to the laws of the State of Delaware.

2.3 Westmoreland Resources ("Westmoreland"), as used herein, refers to a certain partnership organized and existing under that name pursuant to the laws of the State of Montana and to its anticipated successor-in-interest, Westmoreland Resources, Inc., a corporation to be organized and to exist pursuant to the laws of the State of Delaware. The partners of the partnership have been Kewanee Industries, Inc., Morrison-Knudsen Company, Inc. and Westmoreland Coal Company, all [4] being corporations organized and existing pursuant to the laws of the State of Delaware, and Penn-Virginia Corporation, a corporation organized and existing pursuant to the laws of the State of Virginia.

3. Defendants. The following defendants are sometimes hereinafter referred to as "defendants":

3.1 Defendant Montana is a sovereign state of the United States of America.

3.2 Defendant Judge is Governor of Montana.

3.3 Defendant Dore is the Director of the Montana State Department of Revenue.

3.4 Defendant Freseman is the State Treasurer of Montana.

4. There exists between the parties an actual controversy, justiciable in nature and within the jurisdiction of this Court, in respect of which the Court can render

an adequate and effective judgment that will advance the interests of justice.

5. Chapter 525 of the Montana Laws of 1975 purports to impose a tax upon the severance of coal extracted in Montana. The said Chapter 525, as from time to time amended, is codified at Chapter 13 of Title 84 of the Revised Codes of Montana of 1947 and is hereinafter referred to as the "Coal Severance Tax."

6. Each Coal Producing Plaintiff and a non-party Western Energy Company ("Western Energy"), a corporation which, on information and belief, is organized and existing pursuant to the laws of the State of Montana, has operated and continues to operate one or more coal mines within Montana.

7. During the first calendar quarter of 1978, each Coal Producing Plaintiff and Western Energy extracted from such [5] mines large quantities of coal which, upon information and belief, are subject to the Coal Severance Tax.

8. All or substantially all of the coal extracted by the Coal Producing Plaintiffs in Montana is shipped by it to customers, including the Utility Plaintiffs, outside Montana.

9. A large proportion of the coal extracted by Western Energy in Montana is shipped to customers, including one or more Utility Plaintiffs, outside Montana.

10. Severance, extraction and shipment of coal by the Coal Producing Plaintiffs and by Western Energy for use

by the Utility Plaintiffs are activities in and which substantially affect interstate commerce.

11. The coal severed, extracted and shipped by the Coal Producing Plaintiffs and Western Energy plays an important role in enabling the Utility Plaintiffs to comply with the current regulations issued by agencies of the United States Government and by agencies of the various states under mandate of the United States Government.

12. Each Utility Plaintiff is a public utility which has operated and continues to operate electrical generation and distribution facilities in the following states and which has sold and continues to sell electrical power to consumers in such states:

12.1 Commonwealth Edison serves customers in Illinois.

12.2 Central Illinois Light serves customers in Illinois.

12.3 Dairyland serves customers in Illinois, Iowa, Minnesota and Wisconsin.

12.4 Detroit Edison serves customers in Michigan.

[6] 12.5 Interstate serves customers in Iowa, Minnesota and Illinois.

12.6 Lake Superior serves customers in Wisconsin and Michigan.

12.7 LCRA/Austin serves customers in Texas.

12.8 Minnesota P&L serves customers in Minnesota and Wisconsin.

12.9 Northern States serves customers in Minnesota, Wisconsin, North Dakota and South Dakota.

12.10 Upper Peninsula serves customers in Michigan.

12.11 Wisconsin P&L serves customers in Wisconsin.

13. Each Utility Plaintiff is obligated, pursuant to one or more written agreements, to purchase substantial quantities of coal extracted in Montana from one or more of the Coal Producing Plaintiffs or Western Energy, to wit:

13.1 Commonwealth Edison is obligated to purchase coal from Decker pursuant to certain written agreements dated January 14, 1971 and June 20, 1974.

13.2 Central Illinois Light is obligated to purchase coal from Westmoreland pursuant to a certain written agreement dated January 1, 1975, as from time to time amended.

13.3 Dairyland is obligated to purchase coal from Westmoreland pursuant to a certain written agreement dated June 15, 1972.

13.4 Detroit Edison is obligated to purchase coal from Decker pursuant to a certain written agreement dated August 14, 1973, as from time to time amended.

13.5 Interstate is obligated to purchase coal [7] from Westmoreland pursuant to a certain written agreement dated June 15, 1972.

13.6 Lake Superior is obligated to purchase coal from Western Energy pursuant to a certain written agreement dated January 1, 1974.

13.7 LCRA/Austin is obligated to purchase coal from Decker pursuant to a certain written agreement dated October 24, 1974.

13.8 Minnesota P&L is obligated to purchase coal from Peabody pursuant to a certain written agreement dated July 29, 1968, as from time to time amended.

13.9 Northern States is obligated to purchase coal from Western Energy and Westmoreland pursuant to certain written agreements dated August 16, 1972 and June 15, 1972, respectively, as from time to time amended.

13.10 Upper Peninsula is obligated to purchase coal from Western Energy and Westmoreland pursuant to certain written agreements dated February 16, 1977 and January 1, 1977, respectively.

13.11 Wisconsin P&L is obligated to purchase coal from Western Energy and Westmoreland pursuant to certain written agreements dated October 4, 1972 and June 15, 1972, respectively.

14. Each agreement identified in paragraphs 13 through 13.11, as from time to time amended, remains in full force and effect.

Complaint in Commonwealth Edison Co., et al. v. State of Montana, et al.—June 20, 1978

15. On or about April 27, 1978, within sixty days preceding commencement of this action, the Coal Producing Plaintiffs and Western Energy made payments in respect of the Coal Severance Tax allegedly due and owing for the period from [8] January 1, 1978, to March 31, 1978. These payments equalled or exceeded the following amounts:

15.1 Decker paid $2,763,188.00 in such taxes.

15.2 Peabody paid $569,198.00 in such taxes.

15.3 Westmoreland paid $1,243,582.00 in such taxes.

15.4 Western Energy paid $2,443,737.56 in such taxes.

15.5 Pursuant to the Revised Codes of Montana, the payments identified in paragraphs 15 through 15.4 of the Complaint were made under protest, except that only $899,407.88 of the amount referred to in paragraph 15.4 was so paid.

16. From time to time hereafter, the Coal Producing Plaintiffs and Western Energy will be required to make additional payments of the Coal Severance Tax. Plaintiffs respectfully ask leave to amend this Complaint at the time of trial to recover all sums so paid.

17. Pursuant to the agreements identified in paragraphs 13 through 13.11 of this Complaint, the Utility Plaintiffs are obligated to reimburse the Coal Producing Plaintiffs and Western Energy for the tax payments identified in paragraphs 15 through 15.4 and 16 of this Complaint.

18. The ultimate burden of tax payments identified in paragraphs 15, 16 and 17 of this Complaint falls upon the Utility Plaintiffs and upon their customers in the states identified in paragraphs 12 through 12.11 of this Complaint.

FIRST CAUSE OF ACTION (BURDEN ON INTERSTATE COMMERCE—FAIR SHARE)

19. Plaintiffs repeat and reallege each and every [9] allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

20. At the time each Coal Producing Plaintiff extracts coal from its mines in Montana, the ultimate destination of such coal is fixed and is known to be a destination outside Montana.

21. At the time Western Energy extracts coal from its mine in Montana for any Utility Plaintiff, the ultimate destination of such coal is fixed and is known to be a destination outside Montana.

22. From at least the time of severance from the earth until arrival and delivery of such coal at an ultimate destination outside Montana, such coal is and continues to be in and to substantially affect interstate commerce.

23. The Coal Severance Tax imposes taxes on strip mined coal, such as that mined by the Coal Producing Plaintiffs and Western Energy, ranging from 20% of value to 30% of value (but not less than 12 cents per ton), depending on heating quality.

24. All or substantially all of the coal shipped to the Utility Plaintiffs is taxed at 30% of value.

25. On information and belief, Montana anticipates that its revenues from the Coal Severance Tax will be not less than $34,099,000 in fiscal year 1978 ending June 30, 1978 and not less than $40,000,000 in fiscal year 1979 ending June 30, 1979.

26. The Coal Severance Tax is not fairly related to the services and protection provided by Montana.

27. The Coal Severance Tax discriminates against interstate commerce.

[10] 28. The Coal Severance Tax is unconstitutional under Article I, Section 8, Clause 3 of the United States Constitution in that its provisions unduly burden interstate commerce.

SECOND CAUSE OF ACTION
(PREEMPTION BY NATIONAL ENERGY AND CLEAN AIR POLICIES)

29. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

30. From time to time, the United States Congress has enacted legislation which declares it to be the national policy of the United States to stimulate and encourage production of coal to satisfy the energy requirements of the entire United States.

31. Congress has further enacted legislation which, in order to satisfy national policies with respect to air

quality and other environmental concerns, encourages or requires use throughout the United States of low-sulphur coal such as that mined by the Coal Producing Plaintiffs, Western Energy and others within Montana.

32. The Coal Severance Tax, on its face and as applied, substantially frustrates and impairs fulfillment of the foregoing national policies and, in particular, frustrates and impairs the purposes of the aforementioned Acts of Congress.

33. The Coal Severance Tax is unconstitutional under Article VI, Clause 2, of the United States Constitution in that its provisions conflict with and are preempted by the aforementioned federal statutes. [11]

THIRD CAUSE OF ACTION
(PREEMPTION OF FEDERAL COAL RESERVES BY STATUTES REGULATING PROCEEDS THEREFROM)

34. Plaintiffs (except Westmoreland) repeat and reallege each and every allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

35. A substantial portion of the coal mined by the Coal Producing Plaintiffs (except Westmoreland) and by Western Energy and delivered to the Utility Plaintiffs is and continues to be mined pursuant to leases issued by the United States of America.

36. The Congress of the United States has heretofore considered at length the right to receive the economic rents to be derived from ownership and taxation of federal coal deposits in, among other places, Montana.

37. In or about 1920, Congress enacted the Mineral Lands Leasing Act of 1920 (41 Stat. 437).

38. Among other things, the Mineral Lands Leasing Act of 1920 effected a compromise between the federal government and the states by providing:

(a) that mineral and coal deposits theretofore owned by the United States would be retained by the United States for the benefit of the citizens of the entire country and not solely for the benefit of citizens of the particular states in which such deposits were located;

(b) that such deposits would be leased upon terms set by the Secretary of the Interior in a manner and at royalty rates which would encourage development thereof (30 U.S.C. § 201, *et seq.*); and

(c) that a certain percentage of royalties received by the United States from such leases would be [12] directly or indirectly paid over to the states in which such coal was located for the use and benefit of such states (30 U.S.C. § 191).

39. In or about 1976, Congress amended the aforementioned Mineral Lands Leasing Act of 1920 by enacting the Federal Coal Leasing Amendments Act of 1975 (90 Stat. 1083).

40. Among other things, the Federal Coal Leasing Amendments Act of 1975 provided:

(a) that minimum royalties on federally owned coal be increased (30 U.S.C. § 207);

(b) that the proportion of revenues received by the United States and paid over to the individual states in which leases were issued be increased (30 U.S.C. § 191); and

(c) that such revenues as may be paid to the states are "to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service. . . ." (30 U.S.C. § 191).

41. By the aforementioned federal statutes, Congress intended to, and did, establish the following federal policies, among others:

(a) that federally-owned coal in Montana and elsewhere was to be held in trust for the benefit of the citizens of the entire country; and

(b) that the economic rents attributable to the extraction of federally-owned coal were to be collected, in [13] the first instance, by the federal government through the instrumentality of coal leases entered into under the authority of the Secretary of the Interior upon terms to be negotiated and fixed by him, and thereafter divided between the federal government and the state in which such coal was located in the proportions provided by federal law.

42. By the enactment of the Coal Severance Tax, Montana intended to, and did, in violation of the aforesaid federal policies, appropriate to itself the economic rents attributable to the extraction of federally-owned coal from land in Montana.

43. The Coal Severance Tax grossly distorts the compromises between the federal government and the states, as contemplated in the Mineral Lands Leasing Act of 1920, and substantially frustrates and impairs the purposes of the aforementioned Acts of Congress.

44. The Coal Severance Tax is unconstitutional under Article VI, Clause 2, of the United States Constitution in that its provisions conflict with and are preempted by the aforementioned federal statutes.

FOURTH CAUSE OF ACTION
(IMPOUNDMENT OF FUNDS PAID UNDER PROTEST)

45. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 18, and each subparagraph thereof, inclusive.

46. Pursuant to Section 84-4502 of the Revised Codes of Montana, entitled "Payment of Taxes under Protest—Action to Recover," the officer receiving payments of the Coal Severance [14] Tax under protest is required to deposit the same to the credit of a special fund to be designated as a protest fund; to invest the same in interest-bearing deposits; and to retain such protest fund until the final determination of any suit or action to recover same.

47. On information and belief, defendants Dore and Freseman acting individually, and all defendants acting on behalf of Montana, have transferred certain funds paid to them under protest by plaintiffs in violation of Section 84-4502 of the Revised Codes of Montana, and now threaten to transfer other such funds in violation of that section.

48. On information and belief, defendant Judge, acting individually and on behalf of defendant Montana, has caused, permitted or directed the other defendants to do the acts described in paragraph 47 in violation of Section 84-4502 of the Revised Codes of Montana.

WHEREFORE, plaintiffs pray that:

1. Defendants, and each of them, be required to repay to plaintiffs, as their respective interests may appear, the sums paid by the Coal Producing Plaintiffs and Western Energy identified in paragraphs 15 through 15.4 and 16 of this Complaint together with interest to the date of such repayments;

2. The Coal Severance Tax, as a whole and as to each provision thereof, be declared unconstitutional on its face and as applied to plaintiffs;

3. Defendants be enjoined, *pendente lite* and permanently, from relying upon or enforcing any provisions of the Coal Severance Tax against any plaintiff; [15]

4. Defendants be enjoined, *pendente lite* and permanently, from disbursing funds collected under the Coal Severance Tax except to repay the same, with interest; and

5. Plaintiffs be granted their costs and disbursements of this action, together with such other and further relief as this Court deems just and proper.

Dated: June 20, 1978

PATRICK F. HOOKS
/s/Patrick F. Hooks
218 Broadway
Townsend, Montana 59644
(406) 266-3476

ROGERS & WELLS
By /s/William P. Rogers
200 Park Avenue
New York, New York 10017
(212) 972-7000

Attorneys for Plaintiffs

Of Counsel:

Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102
(215) 972-3400

Attorneys for Westmoreland Resources

MONTANA STATUTES

CHAPTER 35 OF THE MONTANA CODE ANNOTATED (EXCERPTS)

COAL SEVERANCE TAX

PART 1

GENERAL PROVISIONS

15-35-101. Legislative findings and declarations of purpose. (1) The legislature finds that while coal is extracted from the earth like metal minerals, there are differences between coal and metal minerals such that they should be classified in different categories for taxation purposes. The legislature finds that while coal can be utilized like petroleum products, there are differences between coal and petroleum such that they should be classified in different categories for taxation purposes. The legislature further finds that:

(a) coal is the only mineral which can supply energy while being easily found in abundance in Montana;

(b) coal is the only mineral which is so often marketed through sales contracts of many years' duration;

(c) coal, unlike most minerals, varies widely in composition and consequent value when marketed;

(d) coal in Montana is subject to regional and national demands for development which could affect the economy and environment of a larger portion of the state than any other mineral development has done;

(e) coal in Montana, when subbituminous and recoverable by strip mining, is in sufficient demand that

at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes;

(f) coal in the lignite form is in less demand and producers of lignite are able to pay lesser amounts of royalty and production tax than producers of subbituminous can pay;

(g) coal produced in underground mines has higher production costs and underground producers are able to pay lesser amounts of royalty and production tax than strip-mine producers can pay;

(h) coal production in Montana has been subject to an uncoordinated array of taxes which overlap one another and yield revenue in an inconsistent and unpredictable manner.

(2) The legislature declares that the purposes of this chapter are to:

(a) allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and

(d) accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry.

Montana Coal Severance Tax

15-35-102. Definitions. As used in this chapter, the following definitions apply:

(1) "Contract sales price" means either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department under 15-35-107.

(2) "Department" means the department of revenue.

(3) "Energy conversion process" includes any process by which coal in the solid state is transformed into slurry, gas, electric energy, or any other form of energy.

(4) "Produced" means severed from the earth.

(5) "Strip mining" or "surface mining" is defined in 82-4-203.

(6) "Taxes paid on production" includes any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production and does not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or in part from the sale of coal, or any license fee.

(7) "Ton" means 2,000 pounds.

(8) "Underground mining" means a coal mining method utilizing shafts and tunnels and as further defined in 82-4-203.

Montana Coal Severance Tax

15-35-103. Severance tax—rates imposed—exemptions. (1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

"Value" means the contract sales price.

(2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

(3) A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year.

15-35-104. Quarterly statement and payment of tax. Each coal mine operator shall compute the severance tax due on each quarter-year's worth of production on forms prescribed by the department. The statement shall indicate the tonnage produced, the average Btu value of the production, the contract sales price received for the production, and such other information as the department may require. The completed form in duplicate,

with the tax payment, shall be delivered to the department not later than 30 days following the close of the quarter. The form shall be verified by an officer of the coal mine operator. A person operating more than one coal mine in this state may include all of his mines in one statement. The department may grant a reasonable extension of time for filing statements and payment of taxes due upon good cause shown therefor.

15-35-105. Penalty for delinquent tax. The department shall add to the amount of all delinquent severance taxes a penalty of 10% of the delinquent amount plus interest at the rate of 1% per month or fraction thereof computed on the total amount of severance tax and penalty. Interest shall be computed from the date the severance tax was due to the date of payment. The department shall mail to the person required to file a quarterly report and pay any severance tax, a letter setting forth the amount of tax, penalty, and interest due, and the letter shall further contain a statement that if payment is not made within 15 days, a lien may be filed as set forth in 15-23-704. The penalty amount may be waived by the department if reasonable cause for the failure or neglect to file the quarterly statement is provided to the department.

* * * * *

15-35-107. When value of coal may be imputed—procedure. (1) The department may impute a value to the coal which approximates market value f.o.b. mine in a case where:

(a) the operator of a coal mine is using the produced coal in an energy-conversion or other manufacturing process;

(b) a person sells coal under a contract which is not an arm's-length agreement; or

(c) a person neglects or refuses to file a statement and tax return under this chapter.

(2) When imputing value, the department may apply the factors used by the federal government under 26 U.S.C., section 613, or that provision as it may be labeled or amended, in determining gross income from mining or the department may apply any other or additional criteria it considers appropriate. Each subject taxpayer shall upon request by the department furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of the contracts under which it is selling coal at the time. When the department's estimate of market value is contested in any proceeding, the burden of proof is on the contesting party.

15-35-108. Disposal of severance taxes. Severance taxes collected under the provisions of this chapter are allocated as follows:

(1) To the trust fund created by Article IX, section 5, of the Montana constitution, 25% of total collections a year. After December 31, 1979, 50% of coal severance tax collections are allocated to this trust fund. The trust fund moneys shall be deposited in the fund established under 17-6-203(5) and invested by the board of investments as provided by law.

(2) Coal severance tax collections remaining after allocation to the trust fund under subsection (1) are allocated in the following percentages of the remaining balance:

Montana Coal Severance Tax

(a) to the county in which coal is mined, 2% of the severance tax paid on the coal mined in that county until January 1, 1980, for such purposes as the governing body of the county may determine;

(b) 2½% until December 31, 1979, and thereafter 5% to the earmarked revenue fund to the credit of the alternative energy research development and demonstration account;

(c) 26½% until July 1, 1979, and thereafter 37½% to the earmarked revenue fund to the credit of the local impact and education trust fund account;

(d) for each of the 2 fiscal years following June 30, 1977, 13% to the earmarked revenue fund to the credit of the coal area highway improvement account;

(e) 10% to the earmarked revenue fund for state equalization aid to public schools of the state;

(f) 1% to the earmarked revenue fund to the credit of the county land planning account;

(g) 2½% to the sinking fund to the credit of the renewable resource development bond account;

(h) 5% to the earmarked revenue fund to the credit of a trust fund for the purpose of parks acquisition or management, protection of works of art in the state capitol, and other cultural and aesthetic projects. Income from this trust fund shall be appropriated as follows:

(i) ⅓ for protection of works of art in the state capitol and other cultural and aesthetic projects; and

(ii) ⅔ for the acquisition of sites and areas described in 23-1-102 and the operation and maintenance of sites so acquired;

(i) 1% to the earmarked revenue fund to the credit of the state library commission for the purposes of providing basic library services for the residents of all counties through library federations and for payment of the costs of participating in regional and national networking;

(j) all other revenues from severance taxes collected under the provisions of this chapter to the credit of the general fund of the state.

* * * * *

15-35-110. Penalties for neglect or false statement. A person who fails, neglects, or refuses to file any statement required under this chapter or who makes a false statement commits a misdemeanor. A person convicted under this section shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

15-35-111. Rulemaking authority. The department of revenue may adopt rules necessary for the taxation of property under this chapter.

CONSTITUTIONAL PROVISIONS

ARTICLE I, SECTION 8, CL. 3 OF THE UNITED STATES CONSTITUTION

Section 8. The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

ARTICLE VI, CL. 2 OF THE UNITED STATES CONSTITUTION

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES

Note: The federal statutes on which appellants rely are voluminous. We reprint extracts which have particular pertinence to the issues raised by the Jurisdictional Statement.

The Clean Air Act of 1970, as amended, 42 U.S.C. 1857 et seq.[1] (excerpts)

TITLE I—AIR POLLUTION PREVENTION AND CONTROL

PART A—AIR QUALITY AND EMISSION LIMITATIONS

FINDINGS AND PURPOSES

Sec. 101. (a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

---

1 Clean Air Act (42 U.S.C. 1857 et seq.) includes the Clean Air Act of 1963—P.L. 88-206, and amendments made by the Motor Vehicle Air Pollution Control Act—P.L. 89-272 (October 20, 1965), the Clean Air Act Amendments of 1966—P.L. 89-675 (October 15, 1966), the Air Quality Act of 1967—P.L. 90-148 (November 21, 1967), the Clean Air Amendments of 1970—P.L. 91-604 (December 31, 1970), the Comprehensive Health Manpower Training Act of 1971—P.L. 92-157 (November 18, 1971), the Energy Supply and Environmental Coordination Act of 1974—P.L. 93-319 (June 22, 1974), Clean Air Act Amendments of 1977—P.L. 95-95 (August 7, 1977), and Safe Drinking Water Act of 1977—P.L. 95-190 (November 16, 1977).

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

AIR QUALITY CRITERIA AND CONTROL TECHNIQUES

Sec. 108. (a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b)(1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

* * * * *

STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Sec. 111. (a) For purposes of this section:

(1) The term "standard of performance" means—

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) applies, a standard—

(i) establishing allowable emission limitations for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion,

(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources) to which subsection (b) applies, a standard such as that referred to in subparagraph (A)(i); and

(C) with respect to any air pollutant emitted from a particular source to which subsection (d) applies, a standard which the State (or the Administrator under the conditions specified in subsection (d)(2)) determines is applicable to that source and which reflects the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources.

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

The Clean Air Act, as amended, 42 U.S.C. 1857 et seq. (excerpts)

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 or any amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 113(d)(5)(A)(ii) of this Act, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b)(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air

pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every four years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h), nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or

modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A) (i) and (ii) shall be promulgated not later than one year after enactment of this paragraph. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d)(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of

performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan. In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

* * * * *

Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627 (excerpts)

An Act to authorize and require the President of the United States to allocate crude oil, residual fuel oil, and refined petroleum products to deal with existing or imminent shortages and dislocations in the national distribution system which jeopardize the public health, safety, or welfare; to provide for the delegation of authority; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

This Act may be cited as the "Emergency Petroleum Allocation Act of 1973".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized

most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

* * * * *

Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871 (excerpts)

An Act to increase domestic energy supplies and availability; to restrain energy demand; to prepare for energy emergencies; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Energy Policy and Conservation Act".

TABLE OF CONTENTS

Sec. 2. Statement of purposes.

Sec. 3. Definitions.

TITLE I—MATTERS RELATED TO DOMESTIC SUPPLY AVAILABILITY

PART A—DOMESTIC SUPPLY

Sec. 101. Coal conversion.

Sec. 102. Incentives to develop underground coal mines.

Sec. 103. Domestic use of energy supplies and related materials and equipment.

Sec. 104. Materials allocation.

Sec. 105. Prohibition of certain lease bidding arrangements.

* * * * *

Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871 (excerpts)

STATEMENT OF PURPOSES

Sec. 2. The purposes of this Act are—

(1) to grant specific standby authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program;

(2) to provide for the creation of a Strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;

(3) to increase the supply of fossil fuels in the United States, through price incentives and production requirements;

(4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;

(5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;

(6) to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources; and

(7) to provide a means for verification of energy data to assure the reliability of energy data.

* * * * *

Energy Policy and Conservation Act of 1975, P.L. 94-163, 89 Stat. 871 (excerpts)

TITLE I—MATTERS RELATED TO DOMESTIC SUPPLY AVAILABILITY

PART A—DOMESTIC SUPPLY

COAL CONVERSION

Sec. 101. (a) Section 2(f) of the Energy Supply and Environmental Coordination Act of 1974 is amended—

(1) in paragraph (1) thereof, by striking out "June 30, 1975" and inserting in lieu thereof "June 30, 1977," and by striking out "January 1, 1979" and inserting in lieu thereof "January 1, 1985"; and

(2) in paragraph (2) thereof, by striking out "December 31, 1978" and inserting in lieu thereof "December 31, 1984," and by striking out "January 1, 1979" and inserting in lieu thereof "January 1, 1985."

(b) Section 2(a) of such Act is amended to read as follows:

"(a) The Federal Energy Administrator—

"(1) shall, by order, prohibit any powerplant, and

"(2) may, by order, prohibit any major fuel burning installation, other than a powerplant,

from burning natural gas or petroleum products as its primary energy source, if the requirements of subsection (b) are met and if (A) the Federal Energy Administrator determines such powerplant or installation on June 22, 1974, had, or thereafter acquires or is designed with, the

capability and necessary plant equipment to burn coal, or (B) such powerplant or installation is required to meet a design or construction requirement under subsection (c)."

(c) Section 2(c) of such Act is amended by inserting "or other major fuel burning installation" after "powerplant" wherever it appears and by inserting "in the case of a powerplant" after "(1)" in the second sentence.

* * * * *

Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233 (excerpts)

An Act to reorganize and consolidate certain functions of the Federal Government in a new Energy Research and Development Administration and in a new Nuclear Regulatory Commission in order to promote more efficient management of such functions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SHORT TITLE

Section 1. This Act may be cited as the "Energy Reorganization Act of 1974."

DECLARATION OF PURPOSE

Sec. 2. (a) The Congress hereby declares that the general welfare and the common defense and security require effective action to develop, and increase the efficiency and reliability of use of, all energy sources to meet the needs of present and future generations, to increase the productivity of the national economy and strengthen its position in regard to international trade, to make the Nation self-sufficient in energy, to advance the goals of restoring, protecting, and enhancing environmental quality, and to assure public health and safety.

(b) The Congress finds that, to best achieve these objectives, improve Government operations, and assure the coordinated and effective development of all energy sources, it is necessary to establish an Energy Research and Development Administration to bring together and direct Federal activities relating to research and development on the various sources of energy, to increase the

efficiency and reliability in the use of energy, and to carry out the performance of other functions, including but not limited to the Atomic Energy Commission's military and production activities and its general basic research activities. In establishing an Energy Research and Development Administration to achieve these objectives, the Congress intends that all possible sources of energy be developed consistent with warranted priorities.

(c) The Congress finds that it is in the public interest that the licensing and related regulatory functions of the Atomic Energy Commission be separated from the performance of the other functions of the Commission, and that this separation be effected in an orderly manner, pursuant to this Act, assuring adequacy of technical and other resources necessary for the performance of each.

(d) The Congress declares that it is in the public interest and the policy of Congress that small business concerns be given a reasonable opportunity to participate, insofar as is possible, fairly and equitably in grants, contracts, purchases, and other Federal activities relating to research, development, and demonstration of sources of energy efficiency, and utilization and conservation of energy. In carrying out this policy, to the extent practicable, the Administrator shall consult with the Administrator of the Small Business Administration.

(e) Determination of priorities which are warranted should be based on such considerations as power-related values of an energy source, preservation of material

resources, reduction of pollutants, export market potential (including reduction of imports), among others. On such a basis, energy sources warranting priority might include, but not be limited to, the various methods of utilizing solar energy.

TITLE I—ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

ESTABLISHMENT

Sec. 101. There is hereby established an independent executive agency to be known as the Energy Research and Development Administration (hereinafter in this Act referred to as the "Administration").

* * * * *

RESPONSIBILITIES OF THE ADMINISTRATOR

Sec. 103. The responsibilities of the Administrator shall include, but not be limited to—

(1) exercising central responsibility for policy planning, coordination, support, and management of research and development programs respecting all energy sources, including assessing the requirements for research and development in regard to various energy sources in relation to near-term and long-range needs, policy planning in regard to meeting those requirements, undertaking programs for the optimal development of the various forms of energy sources, managing such programs, and disseminating information resulting therefrom;

Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233 (excerpts)

(2) encouraging and conducting research and development, including demonstration of commercial feasibility and practical applications of the extraction, conversion, storage, transmission, and utilization phases related to the development and use of energy from fossil, nuclear, solar, geothermal, and other energy sources;

(3) engaging in and supporting environmental, biomedical, physical, and safety research related to the development of energy sources and utilization technologies;

(4) taking into account the existence, progress, and results of other public and private research and development activities, including those activities of the Federal Energy Administration relating to the development of energy resources using currently available technology in promoting increased utilization of energy resources, relevant to the Administration's mission in formulating its own research and development programs;

(5) participating in and supporting cooperative research and development projects which may involve contributions by public or private persons or agencies, of financial or other resources to the performance of the work;

(6) developing, collecting, distributing, and making available for distribution, scientific and technical information concerning the manufacture or development of energy and its efficient extraction, conversion, transmission, and utilization;

Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233 (excerpts)

(7) creating and encouraging the development of general information to the public on all energy conservation technologies and energy sources as they become available for general use, and the Administrator, in conjunction with the Administrator of the Federal Energy Administration shall, to the extent practicable, disseminate such information through the use of mass communications;

(8) encouraging and conducting research and development in energy conservation, which shall be directed toward the goals of reducing total energy consumption to the maximum extent practicable, and toward maximum possible improvement in the efficiency of energy use. Development of new and improved conservation measures shall be conducted with the goal of the most expeditious possible application of these measures;

(9) encouraging and participating in international cooperation in energy and related environmental research and development;

(10) helping to assure an adequate supply of manpower for the accomplishment of energy research and development programs, by sponsoring and assisting in education and training activities in institutions of higher education, vocational schools, and other institutions, and by assuring the collection, analysis, and dissemination of necessary manpower supply and demand data;

(11) encouraging and conducting research and development in clean and renewable energy sources.

* * * * *

Energy Research and Development Administration Act, P.L. 95-39, 91 Stat. 180 (excerpts)

An Act to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 305 of the Energy Reorganization Act of 1974, and section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that the traditional energy sources of this country are being depleted and we must convert to other forms of energy. In addition, it may be necessary to undertake aggressive conservation programs to cut back on energy consumption and eliminate waste and reduce energy use. In spite of these efforts, Congress finds that domestic energy production in this country must approximately double by the end of this century, and must do so as our domestic sources of petroleum and natural gas decline. Therefore, it is essential that the policy of the Congress be established that every form of energy be put into use at the earliest possible moment, consistent with existing environmental laws, that new elements of energy production be placed on line as quickly as possible.

* * * * *

Energy Supply and Environmental Coordination Act of 1974, P.L. 93-319, 88 Stat. 246 (excerpts)

An Act to provide for means of dealing with energy shortages by requiring reports with respect to energy resources, by providing for temporary suspension of certain air pollution requirements, by providing for coal conversion, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SECTION 1. SHORT TITLE; PURPOSE.

(a) This Act, including the following table of contents, may be cited as the "Energy Supply and Environmental Coordination Act of 1974."

* * * * *

(b) The purposes of this Act are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment, and (2) to provide requirements for reports respecting energy resources.

SEC. 2. COAL CONVERSION AND ALLOCATION.

(a) The Federal Energy Administrator—

(1) shall, by order, prohibit any powerplant, and

(2) may, by order, prohibit any major fuel burning installation, other than a powerplant,

from burning natural gas or petroleum products as its primary energy source, if the Federal Energy Administra-

tor determines such powerplant or installation on the date of enactment of this Act has the capability and necessary plant equipment to burn coal, and if the requirements of subsection (b) are met.

* * * * *

Federal Coal Leasing Amendments Act of 1975, P.L. 94-377, 90 Stat. 1083 (excerpts)

An Act to amend the Mineral Leasing Act of 1920, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Federal Coal Leasing Amendments Act of 1975."

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision of the Mineral Lands Leasing Act, the reference shall be considered to be made to a section or other provision of the Act of February 25, 1920, entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (41 Stat. 437).

Sec. 2. The first sentence of section 2(a) of the Mineral Lands Leasing Act (30 U.S.C. 201(a)) is amended to read as follows:

"(1) The Secretary of the Interior is authorized to divide any lands subject to this Act which have been classified for coal leasing into leasing tracts of such size as he finds appropriate and in the public interest and which will permit the mining of all coal which can be economically extracted in such tract and thereafter he shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands for leasing and shall award leases thereon by competitive bidding. No less than 50 per centum of the total acreage offered for lease by the Secretary in any one year shall be leased under a system of deferred

bonus payment. Upon default or cancellation of any coal lease for which bonus payments are due, any unpaid remainder of the bid shall be immediately payable to the United States. A reasonable number of leasing tracts shall be reserved and offered for lease in accordance with this section to public bodies, including Federal agencies, rural electric cooperatives, or nonprofit corporations controlled by any of such entities: *Provided,* That the coal so offered for lease shall be for use by such entity or entities for sale to their members or customers (except for short-term sales to others). No bid shall be accepted which is less than the fair market value, as determined by the Secretary, of the coal subject to the lease. Prior to his determination of the fair market value of the coal subject to the lease, the Secretary shall give opportunity for and consideration to public comments on the fair market value. Nothing in this section shall be construed to require the Secretary to make public his judgment as to the fair market value of the coal to be leased, or the comments he receives thereon prior to the issuance of the lease."

* * * * *

Sec. 6. Section 7 of the Mineral Lands Leasing Act (30 U.S.C. 207) is amended to read as follows:

"Sec. 7. (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A

lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

"(b) Each lease shall be subject to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee. The Secretary of the Interior, upon determining that the public interest will be served thereby, may suspend the condition of continued operation upon the payment of advance royalties. Such advance royalties shall be no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to production ratio (determined by the Secretary). The aggregate number of years during the period of any lease for which advance royalties may be accepted in lieu of the condition of continued operation shall not exceed ten. The amount of any production royalty paid for any year shall be reduced (but not below 0) by the amount of any advance royalties paid under such lease to the extent that such advance royalties have not been used to reduce production royalties for a prior year. No advance royalty

paid during the initial twenty-year term of a lease shall be used to reduce a production royalty after the twentieth year of a lease. The Secretary may, upon six months' notification to the lessee cease to accept advance royalties in lieu of the requirement of continued operation. Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) relating to commencement of production at the end of ten years.

"(c) Prior to taking any action on a leasehold which might cause a significant disturbance of the environment, and not later than three years after a lease is issued, the lessee shall submit for the Secretary's approval an operation and reclamation plan. The Secretary shall approve or disapprove the plan or require that it be modified. Where the land involved is under the surface jurisdiction of another Federal agency, that other agency must consent to the terms of such approval."

* * * * *

Sec. 9. (a) Section 35 of the Mineral Lands Leasing Act, as amended (30 U.S.C. 191) is further amended by deleting "52½ per centum thereof shall be paid into, reserved" and inserting in lieu thereof: "40 per centum thereof shall be paid into, reserved," and is further amended by striking the period at the end of the proviso and inserting in lieu thereof the following language: "*Provided further,* That an additional 12½ per centum of all moneys received from sales, bonuses, royalties, and rentals of public lands under the provisions of this Act and the Geothermal Steam Act of 1970 shall be paid

Federal Coal Leasing Amendments Act of 1975, P.L. 94-377, 90 Stat. 1083 (excerpts)

by the Secretary of the Treasury as soon as practicable after December 31 and June 30 of each year to the State within the boundaries of which the leased lands or deposits are or were located; said additional 12½ per centum of all moneys paid to any State on or after January 1, 1976, shall be used by such State and its subdivisions as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act for (1) planning, (2) construction and maintenance of public facilities, and (3) provision of public services:

* * * * *

Federal Nonnuclear Energy Research and Development Act of 1974, P.L. 93-577, 88 Stat. 1878 (excerpts)

An Act to establish a national program for research and development in nonnuclear energy sources.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SHORT TITLE

Section 1. This Act may be cited as the "Federal Nonnuclear Energy Research and Development Act of 1974."

STATEMENT OF FINDINGS

Sec. 2. The Congress hereby finds that—

(a) The Nation is suffering from a shortage of environmentally acceptable forms of energy.

(b) Compounding this energy shortage is our past and present failure to formulate a comprehensive and aggressive research and development program designed to make available to American consumers our large domestic energy reserves including fossil fuels, nuclear fuels, geothermal resources, solar energy, and other forms of energy. This failure is partially because the unconventional energy technologies have not been judged to be economically competitive with traditional energy technologies.

(c) The urgency of the Nation's energy challenge will require commitments similar to those undertaken in the Manhattan and Apollo projects; it will require that the

Federal Nonnuclear Energy Research and Development Act of 1974, P.L. 93-577, 88 Stat. 1878 (excerpts)

Nation undertake a research, development, and demonstration program in nonnuclear energy technologies with a total Federal investment which may reach or exceed $20,000,000,000 over the next decade.

(d) In undertaking such program, full advantage must be taken of the existing technical and managerial expertise in the various energy fields within Federal agencies and particularly in the private sector.

(e) The Nation's future energy needs can be met if a national commitment is made now to dedicate the necessary financial resources, to enlist our scientific and technological capabilities, and to accord the proper priority to developing new nonnuclear energy options to serve national needs, conserve vital resources, and protect the environment.

STATEMENT OF POLICY

Sec. 3. (a) It is the policy of the Congress to develop on an urgent basis the technological capabilities to support the broadest range of energy policy options through conservation and use of domestic resources by socially and environmentally acceptable means.

(b)(1) The Congress declares the purpose of this Act to be to establish and vigorously conduct a comprehensive, national program of basic and applied research and development, including but not limited to demonstrations of practical applications, of all potentially beneficial energy sources and utilization technologies, within the Energy Research and Development Administration.

Federal Nonnuclear Energy Research and Development Act of 1974, P.L. 93-577, 88 Stat. 1878 (excerpts)

(2) In carrying out this program, the Administrator of the Energy Research and Development Administration (hereinafter in this Act referred to as the "Administrator") shall be governed by the terms of this Act and other applicable provisions of law with respect to all nonnuclear aspects of the research, development, and demonstration program; and the policies and provisions of the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.), and other provisions of law shall continue to apply to the nuclear research, development, and demonstration program.

(3) In implementing and conducting the research, development, and demonstration programs pursuant to this Act, the Administrator shall incorporate programs in specific nonnuclear technologies previously enacted into law, including those established by the Solar Heating and Cooling Act of 1974 (Public Law 93-409), the Geothermal Energy Research, Development, and Demonstration Act of 1974 (Public Law 93-410), and the Solar Energy Research, Development, and Demonstration Act of 1974 (Public Law 93-473).

* * * * *

Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437 (excerpts)

Chap. 85—An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided,* That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further,* That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further,* That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country,

shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

COAL

Sec. 2. That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided,* That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants: *Provided further,* That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years, for not

exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit: *And provided further,* That in no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated: *And provided further,* That no company or corporation operating a common carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations, and no such company or corporation shall receive or hold more than one permit or lease for each two hundred miles of its railroad line within the State in which said property is situated, exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam: *And provided further,* That nothing herein shall preclude such a railroad of less than two hundred miles in length from securing and holding one permit or lease hereunder.

Sec. 3. That any person, association, or corporation holding a lease of coal lands or coal deposits under this Act may, with the approval of the Secretary of the

Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

Sec. 4. That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the existing lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease.

Sec. 5. That if, in the judgment of the Secretary of the Interior, the public interest will be subserved thereby, lessees holding under lease areas not exceeding the maximum permitted under this Act may consolidate their leases through the surrender of the original leases and the inclusion of such areas in a new lease of not to exceed two thousand five hundred and sixty acres of contiguous lands.

Sec. 6. That where coal or phosphate lands aggregating two thousand five hundred and sixty acres and subject to lease hereunder do not exist as contiguous areas, the Secretary of the Interior is authorized, if, in

his opinion the interests of the public and of the lessee will be thereby subserved, to embrace in a single lease noncontiguous tracts which can be operated as a single mine or unit.

Sec. 7. That for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by

law at the time of the expiration of such periods: *Provided,* That the Secretary of the Interior may, if in his judgment the public interest will be subserved thereby, in lieu of the provision herein contained requiring continuous operation of the mine or mines, provide in the lease for the payment of an annual advance royalty upon a minimum number of tons of coal, which in no case shall aggregate less than the amount of rentals herein provided for: *Provided further,* That the Secretary of the Interior may permit suspension of operation under such lease for not to exceed six months at any one time when market conditions are such that the lease can not be operated except at a loss.

Sec. 8. That in order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their use but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied, on such conditions not inconsistent with this Act as in his opinion will safeguard the public interests: *Provided,* That this privilege shall not extend to any corporations: *Provided further,* That in the case of municipal corporations the Secretary of the Interior may issue such limited license or permit, for not to exceed three hundred and twenty acres for a municipality of less than one hundred thousand population, and not to exceed one thousand two hundred and eighty acres for a municipality of not less than one hundred thousand and not more than one hundred and

Mineral Lands Leasing Act of 1920,
Ch. 85, 41 Stat. 437 (excerpts)

fifty thousand population; and not to exceed two thousand five hundred and sixty acres for a municipality of one hundred and fifty thousand population or more, the land to be selected within the State wherein the municipal applicant may be located, upon condition that such municipal corporations will mine the coal therein under proper conditions and dispose of the same without profit to residents of such municipality for household use: *And provided further,* That the acquisition or holding of a lease under the preceding sections of this Act shall be no bar to the holding of such tract or operation of such mine under said limited license.

* * * * *

Sec. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public

roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided,* That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

* * * * *

Natural Gas Policy Act of 1978,
P.L. 95-621, 92 Stat. 3350 (excerpts)

TITLE I—WELLHEAD PRICING

Subtitle A—Wellhead Price Controls

Sec. 102. CEILING PRICE FOR NEW NATURAL GAS AND CERTAIN NATURAL GAS PRODUCED FROM THE OUTER CONTINENTAL SHELF.

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of—

(1) new natural gas; and

(2) natural gas produced from any old lease on the Outer Continental Shelf and qualifying under subsection (d) for the new natural gas ceiling price.

(b) MAXIMUM LAWFUL PRICE.—The maximum lawful price under this section for any month shall be—

(1) $1.75 per million Btu's, in case of April 1977; and

(2) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subsection for the preceding month multiplied by the monthly equivalent factor equal to the sum of—

(A) the annual inflation adjustment factor applicable for such month; plus

(B)(i) .035, in the case of any month beginning before April 20, 1981; or

Natural Gas Policy Act of 1978,
P.L. 95-621, 92 Stat. 3350 (excerpts)

(ii) .04, in the case of any month beginning after April 20, 1981.

* * * * *

Subtitle B—Decontrol of Certain Natural Gas Prices

Sec. 121. ELIMINATION OF PRICE CONTROLS FOR CERTAIN NATURAL GAS SALES.

(a) GENERAL RULE. Subject to the reimposition of price controls as provided in section 122, the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985:

(1) NEW NATURAL GAS.—New natural gas (as defined in section 102(c)).

(2) NEW, ONSHORE PRODUCTION WELLS. —Natural gas produced from any new, onshore production well (as defined in section 103(c)), if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

(3) INTRASTATE CONTRACTS IN EXCESS OF $1.00.—Natural gas sold under an existing contract, any successor to an existing contract, or any rollover contract, if—

(A) such natural gas was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act; and

(B) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price would have been paid had deliveries occurred on such date is higher than $1.00 per million Btu's.

(b) HIGH-COST NATURAL GAS.—Effective beginning on the effective date of the incremental pricing rule required under section 201, the provisions of subtitle A respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 107(c)(1), (2), (3), or (4).

(c) NATURAL GAS PRODUCED FROM 5,000 OR LESS.—Effective beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section 122, the provisions of subtitle A respecting the maximum lawful price for any first sale of natural gas shall, except as provided in subsection (d), cease to apply to any first sale of natural gas produced from any new, onshore production well (as defined in section 103(c)), if such natural gas—

(1) was not committed or dedicated to interstate commerce on April 20, 1977; and

(2) is produced from a completion location which is located at a depth of 5,000 feet or less.

Natural Gas Policy Act of 1978,
P.L. 95-621, 92 Stat. 3350 (excerpts)

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The provisions of subsections (a) and (c) shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(e) LIMITATION ON INDEFINITE PRICE ESCALATORS.—Natural gas which is not subject to maximum lawful prices under subtitle A solely by reason of subsection (a)(3) and which is sold under any existing contract or successor to an existing contract at a price established under an indefinite price escalator clause (as defined in section 105(b)(3)(B)) shall be subject to the provisions of section 105(b)(3).

* * * * *

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

TITLE I—GENERAL PROVISIONS

SEC. 102. FINDINGS; STATEMENT OF PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) the protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expended use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuel-burning installations; and

(2) the purposes of this Act are furthered in cases in which coal or other alternate fuels are used by electric powerplants and major fuel-burning installations, consistent with applicable environmental requirements, as primary energy souces in lieu of natural gas or petroleum.

(b) STATEMENT OF PURPOSES.—The purpose of this Act, which shall be carried out in a manner consistent with applicable environmental requirements, are—

(1) to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources of the United States to the extent such reduction and use further the goal of national energy self-sufficiency and otherwise are in the best interests of the United States;

(2) to conserve natural gas and petroleum for uses, other than electric utility or other industrial or commercial generation of steam or electricity, for which there are no feasible alternative fuels or raw material substitutes;

(3) to encourage and foster the greater use of coal and other alternative fuels, in lieu of natural gas and petroleum, as a primary energy source;

(4) to the extent permitted by this Act, to encourage the use of synthetic gas derived from coal or other alternate fuels;

(5) to encourage the rehabilitation and upgrading of railroad service and equipment necessary to transport coal to regions of States which can use coal in greater quantities;

(6) to prohibit or, as appropriate, minimize the use of natural gas and petroleum as a primary energy source and to conserve such gas and petroleum for the benefit of present future generations;

(7) to encourage the modernization or replacement of existing and new electric powerplants and major fuel-burning installations which utilize natural gas or petroleum as a primary energy source and which cannot utilize coal or other alternate fuels where to do so furthers the conservation of natural gas and petroleum;

(8) to require that existing and new electric powerplants and major fuel-burning installations

which utilize natural gas, petroleum, or coal or other alternate fuels pursuant to this Act comply with applicable environmental requirements;

(9) to insure that all Federal agencies utilize their authorities fully in furtherance of the purposes of this Act by carrying out programs designed to prohibit or discourage the use of natural gas and petroleum as a primary energy source and by taking such actions as lie within their authorities to maximize the efficient use of energy and conserve natural gas and petroleum in programs funded or carried out by such agencies;

(10) to insure that adequate supplies of natural gas are available for essential agricultural uses (including crop drying, seed drying, irrigation, fertilizer production, and production of essential fertilizer ingredients for such uses);

(11) to reduce the vulnerability of the United States to energy supply interruptions; and

(12) to regulate interstate commerce.

SEC. 103. DEFINITIONS.

(a) Unless otherwise expressly provided, for the purposes of this Act—

* * * * *

(5) The term "coal" means anthracite and bituminous coal, lignite, and any fuel derivative thereof.

(6) The term "alternate fuel" means electricity or any fuel, other than natural gas or petroleum, and includes—

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(A) petroleum coke, shale oil, uranium, biomass, and municipal, industrial, or agricultural wastes, wood, and renewable and geothermal energy sources;

(B) liquid, solid, or gaseous waste byproducts of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity, as determined under rules prescribed by the Secretary; and

(C) waste gases from industrial operations.

(7)(A) The terms "electric powerplant" and "powerplant" mean any stationary electric generating unit, consisting of a boiler, a gas turbine, or a combined cycle unit, which produces electric power for purposes of sale or exchange and—

(i) has the design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater; or

(ii) is in a combination of two or more electric generating units which are located at the same site and which in the aggregate have a design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 250 million Btu's per hour or greater.

(B) For purposes of subparagraph (A), the term "electric generating unit" does not include—

(i) any electric generating unit subject to the licensing jurisdiction of the Nuclear Regulatory Commission; and

(ii) any cogeneration facility, less than half of the annual electric power generation of which is sold or exchanged for resale, as determined by the Secretary.

(C) For purposes of clause (ii) of subparagraph (A), there shall be excluded any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu's per hour and the exclusion of which for purposes of such clause is determined by the Secretary, by rule, to be appropriate.

(8) The term "new electric powerplant" means—

(A) any electric powerplant for which construction or acquisition began on a date on or after the date of enactment of this Act; and

(B) any electric powerplant for which construction or acquisition began on a date after April 20, 1977, and before the date of the enactment of this Act, unless the Secretary finds the construction or acquisition of such powerplant could not be canceled, rescheduled, or modified to comply with the applicable requirements of this Act without—

(i) adversely affecting electric system reliability (as determined by the Secretary after consultation with the Federal Energy Regulatory Commission and the appropriate State authority), or

(ii) imposing substantial financial penalty (as determined under rules prescribed by the Secretary).

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(9)(A) The term "existing electric powerplant" means any electric powerplant other than a new electric powerplant.

(B) Any powerplant treated under this Act as an existing electric powerplant shall not be treated thereafter as a new electric powerplant merely by reason of a transfer of ownership.

(10)(A) The terms "major fuel-burning installation" and "installation" means a stationary unit consisting of a boiler, gas turbine unit, combined cycle unit, or internal combustion engine which—

(i) has a design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 100 million Btu's per hour or greater; or

(ii) is in combination of two or more such units which are located at the same site and which in the aggregate have a design capability of consuming any fuel (or mixture thereof) at a fuel heat input rate of 250 million Btu's per hour or greater.

(B) The terms "major fuel-burning installation" and "installation" do not include—

(i) any electric powerplant; or

(ii) any pump or compressor used solely in connection with the production, gathering, transmission, storage, or distribution of gases or liquids, but only if there is certification to the Secretary of such use (in accordance with rules prescribed by the Secretary).

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(C) For purposes of clause (ii) of subparagraph (A), there shall be excluded any unit which has a design capability to consume any fuel (including any mixture thereof) that does not equal or exceed 100 million Btu's per hour and the exclusion of which for purposes of such clause is determined by the Secretary, by rule to be appropriate.

(11) The term "new major fuel-burning installation" means—

(A) any major fuel-burning installation on which construction or acquisition began on a date on or after the date of the enactment of this Act; and

(B) any major fuel-burning installation on which construction or acquisition began on a date after April 20, 1977, and before the date of the enactment of this Act, unless the Secretary finds the construction or acquisition of such installation could not be canceled, rescheduled, or modified to comply with applicable requirements of this Act without—

(i) incurring significant operational detriment of the unit (as determined by the Secretary); or

(ii) imposing substantial financial penalty (as determined under rules prescribed by the Secretary).

(12)(A) The term "existing major fuel-burning installation" means any installation which is not a new major fuel-burning installation.

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(B) Such term does not include a major fuel-burning installation for the extraction of mineral resources located—

(i) on or above the Continental Shelf of the United States,

or

(ii) on wetlands areas adjacent to the Continental Shelf of the United States,

where coal storage is not practicable or would produce adverse effects on environmental quality.

(C) Any installation treated as an existing major fuel-burning installation shall not be treated thereafter as a new major fuel-burning installation merely by reason of a transfer of ownership.

* * * * *

TITLE II—NEW FACILITIES
Subtitle A—Prohibitions

SEC. 201. NEW ELECTRIC POWERPLANTS.

Except to such extent as may be authorized under subtitle B—

(1) natural gas or petroleum shall not be used as a primary energy source in any new electric powerplant; and

(2) no new electric powerplant may be constructed without the capability to use coal or any other alternate fuel as a primary energy source.

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

SEC. 202. NEW MAJOR FUEL-BURNING INSTALLATIONS.

(a) GENERAL PROHIBITION.—Except to such extent as may be authorized under subtitle B, natural gas or petroleum shall not be used as a primary energy source in a new major fuel-burning installation consisting of a boiler.

(b) AUTHORITY OF SECRETARY TO PROHIBIT NONBOILERS FROM USING NATURAL GAS OR PETROLEUM.—(1) The Secretary may, by rule, prescribe categories (identified in such rules) of new major fuel-burning installations, other than boilers, in which natural gas or petroleum, or both, shall be prohibited from being used as a primary energy source. In identifying categories of new major fuel-burning installations pursuant to this paragraph, the Secretary shall take into account any special circumstances or characteristics of each category of such installations (such as the technical feasibility of burning coal or other alternate fuels and the size or geographic location of such installations). The application of any such final rule in the case of any new major fuel-burning installation subject to such rule shall be stayed pending a resolution (including judicial review) of any petition for an exemption for such installation which is filed with the Secretary not later than 60 days after such final rule is published under section 702(a). Any such final rule shall not apply in the case of any installation with respect to which a comparable prohibition was issued by order (or was proposed but was not issued because it was

demonstrated that it could qualify for an exemption under subtitle B).

(2)(A) The Secretary may, by order, prohibit the use of natural gas or petroleum, or both, as a primary energy source in any new major fuel-burning installation, other than a boiler, if such installation is not, at the time of the issuance of the proposed order, in a category identified in a final rule issued under paragraph (1).

(B) Subject to subparagraph (C), the Secretary shall not issue a final order under this paragraph with respect to any installation if it is demonstrated that there would have been granted an exemption for such installation if such prohibition had been established by rule pursuant to paragraph (1) rather than by order pursuant to this paragraph, except that if a temporary exemption would have been granted, such a final order may be issued but may not take effect until such time as such temporary exemption would have terminated.

(C) In any case in which an order is not issued by reason of subparagraph (B) or in which the effective date of such order is delayed under subparagraph (B), the Secretary shall take such steps as may be necessary to assure the installation involved complies with the same requirements (including provisions of section 214(a)) as would have been applicable if an exemption had been granted based upon the grounds for which the order is not issued or the effective date of which is delayed.

(3) A prohibition under this subsection shall only apply with respect to an installation for which construc-

tion or acquisition began on or after the date of the publication under section 701(b) of the proposed rule or order establishing the prohibition. Any installation not subject to such a prohibition because of the preceding sentence shall be considered an existing major fuel-burning installation for purposes of title III.

* * * * *

TITLE III—EXISTING FACILITIES
SUBTITLE A—PROHIBITIONS

SEC. 301. EXISTING ELECTRIC POWERPLANTS.

(a) GENERAL PROHIBITIONS.—Except to such extent as may be authorized under subtitle B—

(1) natural gas shall not be used as a primary energy source in an existing electric powerplant on or after January 1, 1990;

(2) natural gas shall not be used as a primary energy source in an existing electric powerplant before January 1, 1990, unless such powerplant used natural gas as a primary energy source at any time during calendar year 1977; and

(3) natural gas shall not be used as a primary energy source in an existing electric powerplant in any calendar year before 1990 in greater proportions than the average yearly proportion of natural gas which—

(A) such powerplant used as a primary energy source in calendar years 1974 through 1976, or

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(B) if such powerplant began operations on or after January 1, 1974, such powerplant used as a primary energy source during the first two calendar years of its operation.

The prohibition of paragraph (1) shall be stayed with respect to any existing powerplant pending a resolution (including judicial review) of any petition for any exemption from such prohibition which is filed for such powerplant at any time after the effective date of this Act, but at least one year before the date such prohibition first takes effect.

(b) AUTHORITY OF SECRETARY TO PROHIBIT WHERE COAL OR ALTERNATE FUEL CAPABILITY EXISTS.—The Secretary may prohibit, in accordance with section 303(a) or (b), the use of petroleum or natural gas, or both, as a primary energy source in any existing electric powerplant, if the Secretary finds that—

(1) such powerplant has or previously had the technical capability to use coal or another alternate fuel as a primary energy source;

(2) such powerplant has the technical capability to use coal or another alternate fuel as a primary energy source, or it could have such capability without—

(A) substantial physical modification of the powerplant, or

(B) substantial reduction in the rated capacity of the powerplant; and

Powerplant and Industrial Fuel Use Act of 1978
P.L. 95-620,92 Stat. 3289 (excerpts)

(3) it is financially feasible to use coal or another alternate fuel as a primary energy source in such powerplant.

The requirement of paragraph (1) shall not be considered to be satisfied unless the finding under such paragraph is made before the date of the publication of the notice of proposed prohibition under section 701(b) and is published with such notice.

(c) AUTHORITY OF SECRETARY TO PROHIBIT EXCESSIVE USE IN MIXTURES.—In the case of any existing electric powerplant in which the Secretary finds it is technically and financially feasible to use a mixture of petroleum or natural gas and coal or an alternate fuel as a primary energy source, the Secretary may prohibit, in accordance with section 303(a), the use of petroleum or natural gas, or both, in such powerplant in amounts in excess of the minimum amount necessary to maintain reliability of operation of the unit consistent with maintaining reasonable fuel efficiency of such mixture.

SEC. 302. EXISTING MAJOR FUEL-BURNING INSTALLATIONS.

(a) AUTHORITY OF SECRETARY TO PROHIBIT WHERE COAL OR ALTERNATE FUEL CAPABILITY EXISTS.—The Secretary may prohibit, in accordance with section 303(a) or (b), the use of petroleum or natural gas, or both, as a primary energy source in any existing major fuel-burning installation, if the Secretary finds that—

(1) such installation has or previously had the technical capability to use coal or another alternate fuel as a primary energy source;

(2) such installation has the technical capability to use coal or another alternate fuel as a primary energy source, or it could have such capability without—

(A) substantial physical modification of the unit, or

(B) substantial reduction in the rated capacity of the unit; and

(3) it is financially feasible to use coal or another alternate fuel as a primary energy source in such installation.

The requirement of paragraph (1) shall not be considered to be satisfied unless the finding under such paragraph is made before the date of the publication of the notice of proposed prohibition under section 701(b) and is published with such notice.

(b) AUTHORITY OF SECRETARY TO PROHIBIT EXCESSIVE USE IN MIXTURES.—

(1) In the case of any existing major fuel-burning installation in which the Secretary finds it is technically and financially feasible to use a mixture of petroleum or natural gas and coal or another alternate fuel as a primary energy source the Secretary may prohibit, in accordance with section 303(a), the use of petroleum or natural gas, or both, in such installation in amounts in excess of the minimum percentage of the total Btu

heat input of the primary energy sources needed to maintain reliability of operation of the unit consistent with maintaining reasonable fuel efficiency of such mixture.

(2) The percentage determined by the Secretary under paragraph (1) shall not be less than 25 percent.

* * * * *

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

JOINT APPENDIX

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

Attorneys for Appellants except Western Energy Company

MIKE GREELY
Counsel of Record
Attorney General
MIKE McGRATH
Assistant Attorney General
MIKE McCARTER
Assistant Attorney General
Office of the Attorney General
State Capitol
Helena, Montana 59601
(406) 449-2026

Attorneys for Appellees

January, 1981

(Additional attorneys listed inside front cover)

APPEAL DOCKETED OCTOBER 10, 1980
PROBABLE JURISDICTION NOTED DECEMBER 8, 1980

PATRICK F. HOOKS
THOMAS A. BUDEWITZ
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants
except Western Energy Company

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant
Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant
Westmoreland Resources, Inc.

ROSS CANNON
Cannon & Gillespie
2031 Eleventh Avenue
Helena, Montana 59601
(406) 442-9930

Attorney for Appellees

TABLE OF CONTENTS

PAGE

Docket Entries:

District Court..... 1a

Supreme Court of the State of Montana..... 24a

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaints—July 27, 1979..... 30a

Clean Air Act Amendments of 1977, Pub. L. No. 95-95 § 125, 42 U.S.C. § 7425..... 88a

Additional Documents Are Printed in the Appendix to Appellants' Jurisdictional Statement.

Docket Entries.

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
COMMONWEALTH EDISON CO., CENTRAL ILLINOIS LIGHT CO., *et al.*,	Patrick Hooks
vs.	
STATE OF MONTANA.	Mike Greely

No. 42657

Date	Memoranda	Minute Book	Costs
6/20/78	Filed Complaint for refund of taxes paid under protest and for declaratory and injunctive relief, issued summons		$20.00
	Do Motion for Admission of Attorneys		
	Do Order	75/367	
	Do Plaintiff's first set of Interrogatories to Defendant		
	Do Plaintiff's first request for Production of Documents		
6/27/78	Do Summons and Return		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
6/28/78	Do Return of Service		
	Do Stipulation and Acknowledgement		
7/ 3/78	Do Stipulation	75/381	
7/10/78	Do Motion to Extend Time and Order and Crt.	75/385	
8/ 3/78	Do Motion to Extend time and order	75/410	
	Do Motion to Extend time and order	75/415	
8/31/78	Do Motion		
	Do Affidavit in Support of Motion		
	Do Affidavit in Support of Motion		
	Do Memorandum in Support of Motion		
	Do O.S.C. and Temp. Stay 9-12-78 10 a.m.	75/460	
	Do Certificate of Service by Mail		
9/ 1/78	Do Motion to Dismiss		
9/ 8/78	Do Brief of Defendant	75/481	
9/18/78	—File Briefs by 9/28/78	75/481	
9/28/78	Do Motion to Extend time and Order	75/491	
10/18/78	Do Motion to Extend time and Order	77/12	
11/ 1/78	Do Cross motion		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
	Do Plaintiff's memo in opposition to Defendants Motions to dismiss		
11/ 2/78	—File briefs by December 4, 1978	77/34	
12/11/78	Do Motion and order extending time for filing a reply brief	77/78	
1/ 5/79	Do Letter		
	Do Motion for leave to file brief *amicus curiae*		
	Do affidavit of mailing		
1/11/79	Do Order 2-7-79 3:00 p.m.	77/120	
	Do Order 2-7-79 9:00 a.m.	77/120	
1/23/79	Do Defendant's reply brief and brief in Opposition to Plaintiff's motion to summary judgment		
	Do Appendix Volume I		
	Do Appendix Volume II		
1/31/79	Do Motion for Postponement of Hearing	77/144	
	Do Minute Entry 3-8-79 9:00 a.m. Hearing on Motion to Dismiss and hearing on Texas motion to file brief *amicus curiae*	77/144	
	Do Minute Entry 3-8-79 3:00 p.m.	77/144	
2/ 2/79	Do Praecipe to Enter Name of Counsel		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
2/ 1/79	—Court issued a ruling to Continue Hearing	77/144	
2/16/79	Do Motion for leave to file or participate in brief *amicus curiae*		
	Do Proof of Service		
3/ 8/79	Do Motion for Admission of Counsel		
3/ 9/79	Do Brief *amicus curiae* of State of Texas		
	—A hearing for motion to dismiss and motion for summary judgment was held this day. A motion for severance was granted. Motion to consolidate was heard and Court consolidated 42657 and 42689. Proposed opinion and orders are to be submitted by 3-26-79. Court heard counsel and ordered Texas be allowed to appear as *amicus curiae*	77/173	
3/26/79	Do Order to Consolidate with 42689	77/200	
	Do Defendant's Proposed Opinion and Order on Count IV		
	Do Plaintiff's Supplemental Memo in Opposition to motion to dismiss		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
	Do Plaintiff's proposed Decision of Count IV		
	Do Proposed Decision Denying Motion to Dismiss		
4/ 2/79	Do Order—Count IV of Plaintiff compl. be severed	77/207	
	Do Plaintiff's rebuttal memo in opposition to Defendant's motion to dismiss		
4/ 4/79	Do Transcript of Proceedings		
4/ 3/79	Do Defendant's final reply brief		
4/ 5/79	Do Letter from McGrath Asst. Atty. Gen.		
	Do Corrected copy of Defendant's final reply brief		
4/17/79	Do Defendant's proposed opinion and order		
6/ 4/79	Do Order to submit any comments on or before 6/25/79		
6/ 4/79	Do Letter		
	Do Stipulation for subst. of parties	77/296	
	Do Order Time schedule	77/296	
6/ 5/79	Do Order—Plaintiff cannot require sequestration, Judgment be issued accordingly	77/296	
6/22/79	Do Defendant's Comments and Response by Atty. Gen.		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
7/ 3/79	—Judgment on Count IV filed ordering Defendants motion to dismiss Count IV granted and Plaintiffs cross-motion for summary judgment as to Count IV is denied.		
7/16/79	Do Notice of Entry of Judgment		
7/27/79	Do Order—granting motion to dismiss Counts I, II, III was granted	77/353	
8/ 3/79	Do Letter Do Notice of Appeal		
8/ 6/79	Do Letter to Judge Meloy Do Letter to Judge Meloy Do Argument—Cited case Do Letter from Patrick Hooks 8/15/79		
8/16/79	Do Stipulation that plaintiffs need not file an Undertaking of costs on appeal	77/375	
8/22/79	Do Judgment on Counts I, II, III, JB 15 p. 42 Do Notice of Entry	77/380	
8/24/79	Do Letter from Patrick Hooks Do Notice of Appeal		
9/ 5/79	Do Letter from Patrick Hooks 9/4/79		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation for entry of an order extending time for transmission of record on appeal and order.		
	—Extension of time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
LAKE SUPERIOR DISTRICT POWER CO., NORTHERN STATES POWER CO., *et al.*	Patrick Hooks Rogers & Wells
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross Cannon

No. 42689

Date	Memoranda	Minute Book	Costs
6/28/78	Filed Complaint for refund of taxes paid under protest and for declaratory relief, issued summons		$20.00
7/19/78	Do Motion to extend time and order	76/11	
7/31/78	Do Summons and Return Do Motion to extend time	75/410	
8/31/78	Do Amended Complaint for refund of taxes paid under protest		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
	and for declaratory and injunctive relief		
	Do Motion to Strike and Dismiss		
9/ 8/78	Do Letter from M.P.G.		
	Do Consent to Substitute Attorneys		
	—Do Brief of Defendant	75/481	
9/18/78	—File Brief by 9/28/78	75/481	
9/25/78	Do Motion to strike and dismiss		
9/28/78	Do Motion to extend time and Order		
10/ 2/78	Do Brief in Support of Defendant's motion to strike and to dismiss plaintiff's amended complaint		
10/19/78	Do Motion to extend time and order	77/12	
11/ 1/78	Do Plaintiff Western Energy Company's memo in opposition to defendants motion to dismiss or strike		
	Do Plaintiff's memo in opposition to Defendant's motion to dismiss or strike		
11/ 2/78	—File briefs by Dec. 4, 1978	77/34	
11/16/78	Do Plaintiff Western Energy Co.'s, Brief on motion to strike and/or dismiss complaint		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
12/11/78	Do Motion and order extending time for filing reply brief	77/78	
1/23/79	Do Defendant's reply brief		
1/31/79	Do Motion for postponement of hearing		
2/ 2/79	Do Minute Entry 3-8-79 9:00 a.m.		
	3-8-79 3:00 p.m.	77/145	
3/ 9/79	—Hearing held at this time on motion to dismiss and motion for summary judgment and a motion for severance was granted. Motion to consolidate was heard and Court consolidated 42657 and 42689. Proposed opinion and orders. Order on motion to consolidate is to be prepared and Court ordered that Texas be allowed to appear as *amicus curiae*	77/173	
3/26/79	Do Order to Consolidate with 42657	77/200	
	Do Plaintiffs Supp. Memo Opposition to motion to dismiss		
	Do Decision (Proposed) on Count IV		
	Do Defendants Proposed Opinion Count IV		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
	Do Proposed Decision to dismiss and Consolidate		
4/ 2/79	Do Order to sever amended complaint from other counts	77/207	
	Do Letter from Attorney Hooks		
4/ 5/79	Do Corrected copy of Def. Final Reply brief		
4/17/79	Do Defendant's proposed opinion and order		
6/ 1/79	Do Letter		
	Do Stipulation for sub. of parties	77/296	
6/ 4/79	Do Order to submit comments by June 25, 1979	77/296	
6/ 5/79	Do Order—Plaintiffs cannot require sequestration Judgment to be issued accordingly.	77/296-298	
7/ 3/79	Do Judgment on Count IV—Defendants motion to dismiss Count IV granted plaintiffs motion for summary judgment denied		
	Do Notice of Entry of Judgment	77/330	
7/27/79	Do Order filed in 42657—Motions to dismiss Counts I, II, III granted	77/353	
8/ 3/79	Do Letter		
	Do Notice of Appeal filed 42657		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
8/16/79	Do Stipulation that plaintiffs need not file an undertaking of costs on appeal	77/375	
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 156		
	Do Notice of Entry	77/380	
8/24/79	Do Notice of Appeal		
	Do Letter		
	Do Notice of Appeal		
9/ 4/79	Do Letter from Patrick Hooks		
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation for entry of an order extending time for transmission of record on appeal and order—extending time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
COMMONWEALTH EDISON CO., CENTRAL ILLINOIS LIGHT CO., *et al.*,	Rogers & Wells Patrick Hooks
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 42971

Date	Memoranda	Minute Book	Costs
9/25/78	Filed Complaint, Issued Summons		$20.00
	Do Summons		
10/16/78	Do Motion		
	Do Brief in Support of Defendants motion		
11/15/78	Do Plaintiff's memo in Opposition to Defendant's motion to strike and/or dismiss		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
12/11/78	Do Motion and Order extend time until 1/22/79	77/78	
3/26/79	Do Proposed Decision Count IV Do Proposed Decision Motion Dismiss & Consolidate Do State's Proposed Order		
6/ 5/79	Do Order—Plaintiffs cannot require sequestration Judgment to be issued accordingly	77/298	
	—Judgment on Count IV Defendant's motion to dismiss is granted and plaintiff's cross-motion is denied	77/330	
7/27/79	Do Order filed in 42657 Motions to dismiss on Counts I, II, III is granted	77/353	
8/ 3/79	Do Letter Do Notice of Appeal filed 42657		
8/16/79	Do Stipulation (copy)		
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 42 Do Notice of Entry of Judgment	77/380	
8/24/79	Do Letter Do Notice of Appeal		
9/ 4/79	Do Letter from Patrick F. Hooks		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation of Entry of an order extending time for transmission of record on appeal and order		
	—Extending time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
LAKE SUPERIOR DISTRICT POWER COMPANY, NORTHERN STATES POWER COMPANY, *et al.*	John Carl
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 42972

Date	Memoranda	Minute Book	Costs
9/25/78	Filed Complaint, Issued Summons		$20.00
	Filed Complaint, Issued Summons		20.00
	Do Summons		
	Do Summons		
10/16/78	Do Motion		
	Do Brief in Support of Defendants motion		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
11/15/78	Do Plaintiff's memo in opposition to Defendant's motion to strike and/or dismiss		
	Do Plaintiff's memo in opposition to Defendant's motion to dismiss or strike		
12/11/78	Do Motion and Order extending time	77/78	
3/26/79	Do Proposed Decision Count IV		
	Do Proposed Decision Deny Motion and Consolidate		
	Do State's Proposed Order		
6/ 5/79	Do Order—Plaintiffs cannot require sequestration		
	Judgment to be issued accordingly	77/298	
	—Judgment on Count IV ordering Defendant's motion to dismiss is granted and plaintiffs' cross-motion is denied	77/330	
7/27/79	Do Order filed in 42657 motion to dismiss on Counts I, II, III is granted	77/353	
8/ 3/79	Do Letter		
	Do Notice of Appeal filed in 42657		
8/16/79	Do Stipulation (copy)		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 156	77/380	
	Do Notice of Entry of Judgment		
8/24/79	Do Letter		
	Do Notice of Entry		
9/ 4/79	Do Letter from Patrick Hooks		
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	
9/11/79	Do Stipulation for entry of an order extending time for transmission of record on appeal and order		
	—Extending time to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
COMMONWEALTH EDISON CO., CENTRAL ILLINOIS LIGHT CO., *et al.*	Patrick Hooks
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 43289

Date	Memoranda	Minute Book	Costs
12/21/78	Filed Complaint, Issued Summons		$20.00
12/22/78	Do Summons and Aff. of Service		
1/10/79	Do Motion to Dismiss and/or to Strike		
1/15/79	Do Brief in Support of Defendant's motion to strike		
1/29/79	Do Plaintiff's memo in opposition to Defendant's motion to strike and/or dismiss		

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
3/26/79	Do Proposed Decision		
	Do Proposed Decision Deny Motion to Dismiss and Consolidate		
	Do State's Proposed Order		
6/ 5/79	Do Order—Plaintiffs cannot require sequestration. Judgment to be issued accordingly	77/298	
	—Judgment on Count IV ordering Defendant's motion to dismiss is granted and plaintiff's cross-motion denied	77/330	
7/27/79	Do Order—filed in 42657 on motion to dismiss Counts I, II, III granted	77/353	
8/ 3/79	Do Letter		
	Do Notice of Appeal filed in 42657		
8/16/79	Do Stipulation (copy)		
8/22/79	Do Judgment on Counts I, II, III JB 15 p. 42		
	Do Notice of Entry	77/380	
8/24/79	Do Letter		
	Do Notice of Appeal		
9/ 4/79	Do Letter from Patrick Hooks 9-4-79		
9/ 5/79	Do Stipulation and Affidavit of Mailing	77/403	

Docket Entries—District Court
(Commonwealth Edison action)

Date	Memoranda	Minute Book	Costs
9/11/79	Do Stipulation of Entry of Order extending time for transmission of record on appeal and order—Extended to 10-2-79	77/403	

Docket Entries

REGISTER OF CIVIL ACTIONS

DISTRICT COURT

	Attorneys
LAKE SUPERIOR DISTRICT POWER, NORTHERN STATES POWER CO., *et al.*	Patrick Hooks John Carl
vs.	
STATE OF MONTANA, THOMAS L. JUDGE, *et al.*	Ross W. Cannon

No. 43288

Date	Memoranda	Minute Book	Costs
12/21/78	Filed Complaint, Issued Summons		$20.00
	Do Complaint of Western Energy and Issued summons		
12/22/78	Do Summons and Affidavit of Service		
1/10/79	Do Motion to Dismiss and to Strike		
1/15/79	Do Brief in Support of Defendant's motion		

Docket Entries—District Court
(Lake Superior action)

Date	Memoranda	Minute Book	Costs
1/29/79	Do Plaintiff's Memo in opposition to Defendant's motion to strike and/or dismiss		
2/16/79	—Defendant's motion to strike or dismiss set for 3/1/79 2:00 p.m.	76/290	
2/20/79	—Hearing is vacated without date	76/292	

Docket Entries

REGISTER OF ACTIONS

SUPREME COURT OF THE STATE OF MONTANA

No. 14982

COMMONWEALTH EDISON COMPANY, *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents.

LAKE SUPERIOR DISTRICT POWER CO., *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents.

Attorneys for Plaintiffs-Appellants Commonwealth Edison Co., et al.

ROGERS & WELLS
200 Park Avenue
New York, New York 10017

HOOKS AND BUDEWITZ
218 Broadway
Townsend, Montana 59644

Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

Attorneys for Amicus Curiae

GARRITY, KEEGAN AND BROWN
1400 19th Avenue
Helena, Montana

Attorney for Western Energy Co.

JOHN CARL
40 East Broadway
Butte, Montana 59701

Attorneys for Defendants-Respondents

MIKE GREELY
Attorney General
Helena, Montana

CANNON AND GILLESPIE
2031 11th Avenue
Helena, Montana

Filed in the District Court of the 1st Judicial District, Lewis and Clark County

Nature of Action: Coal tax

Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

MEMORANDUM OF PROCEEDINGS
(Commonwealth Edison Co. et al.)

Date	Memoranda	Minute Book	Costs
9/21/79	Order Per Curiam; prehearing conference set 9:00 on Thurs., Sept. 27; matters include length of briefs, contents of record and time and order of argument		$20.00
9/27/79	Application and Order that State of Texas be permitted to appear as *amicus curiae* and shall file brief under same briefing schedule as appellants		10.00
9/28/79	Order per Curiam. It is ordered (1) The appeal in Cause No. 14991 is hereby consolidated with this cause for oral argument and determination on appeal (2) The record on appeal shall consist of all records and Exhibits before the District Court in any consolidated action herein (3) See Order (4) See Order (5) This consolidated appeal is set for hearing and Oral argument April 15, 1980 at 9:30 a.m. (6), (7), (8) See order		

Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

Date	Memoranda	Minute Book	Costs
10/ 2/79	District Court Files 42971—43288—42657—42689—43289—Exhibits		
11/14/79	Appellants' Brief (Commonwealth Edison Co. *et al.*)		
11/14/79	Appellant Western Energy Company		$20.00
11/15/79	*Amicus* Brief State of Texas		
1/31/80	Application and Order granting State Mont. to Feb. 15, 1980 to file its Brief and Appellants shall have until March 31, 1980 to file Reply Brief.		
2/ 4/80	Order hearing & Oral argument rescheduled for April 21, 1980 at 9:30 a.m. (see order)		
2/15/80	Respondent's Brief.		
3/31/80	Appellants Reply Brief		
4/15/80	Order No. Dakota tax commissioner is granted permission to file *Amicus* Brief.		
4/15/80	*Amicus curiae* Brief (No. Dakota)		
4/21/80	Argued & Submitted. William R. Glendon, William Rogers, John Carl, Appellants. Mike Greely, Ross Cannon, Mike McGrath and Mike McCarter, Re-		

Docket Entries—
Supreme Court of the State of Montana
(consolidated action)

Date	Memoranda	Minute Book	Costs
	spondents. *Amicus curiae:* Mark White, Leo Wilking		
3/28/80	Pre-assigned, Judge Sheehy		
7/17/80	Opinion; Justice Sheehy; affirmed; Unanimous.		
7/30/80	Remittitus and copy of opinion sent to Clerk District Court Helena and Court File and Exhibits returned to Clerk Cert. No. 6648489 and 6648491 and 6648493.		
10/ 2/80	Notice of Appeal to U.S. Supreme Court.		
10/ 6/80	Notice of Appeal to U.S. Supreme Court (John Carl).		
12/11/80	Order from U.S. Supreme Court noting probable jurisdiction.		

Docket Entries

Judgt.: June 27, 1979

REGISTER OF ACTIONS

No. 14991

COMMONWEALTH EDISON COMPANY, *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents,

LAKE SUPERIOR DISTRICT POWER COMPANY, *et al.*,

Plaintiffs and Appellants,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants and Respondents.

MEMORANDUM OF PROCEEDINGS

Date	Memoranda	Minute Book	Costs
9/27/79	Notice of appeal (Count IV)		$20.00
9/28/79	Order per curiam. It is ordered that the appeal in this Cause is hereby consolidated with Cause No. 14982 with instructions (see order)		

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF LEWIS AND CLARK

Nos. 42657, 42971, 43289

COMMONWEALTH EDISON COMPANY, *et al.*,

Plaintiffs,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants.

Nos. 42689, 42972, 43288

LAKE SUPERIOR DISTRICT POWER COMPANY, *et al.*,

Plaintiffs,

—VS.—

STATE OF MONTANA, *et al.*,

Defendants.

ORDER

These cases are actions for refunds of coal severance tax paid by the plaintiffs pursuant to Chapter 35 of Title 15, M.C.A. The amounts were paid under protest and

this suit followed. Plaintiffs seek, also, declaratory and injunctive relief with respect to future installments of the tax.

The plaintiffs allege that they are eleven out-of-state public utilities operating in midwestern and southwestern states and several companies which mine coal in Montana and furnish the coal to the utilities pursuant to long-term contracts. The tax is imposed on the severance of coal from the ground and is measured by the "contract sales price" of the coal when prepared by shipment "F.O.B. the mine." In certain instances the value may be imputed as provided in Section 15-35-107, M.C.A. The rates vary, ranging up to 30% of the value.

In cause number 42657, plaintiffs seek to recover the first payment amounting to $7,019,705.16. With subsequent payments in causes number 42971 and 43289, the sums paid aggregate in excess of $27,000,000.00. The complaint of **[2]** Western Energy Company in causes 42689, 42972 and 43288 separately state its claim for refunds of a portion of the taxes paid and acknowledge that only a portion of its tax payments were made under protest.

The complaints consist of four counts. The fourth count, which asks for an injunction pendente lite to prevent the State from disbursing the taxes collected, has been severed as a separate cause of action and has been dismissed by this court.

The first three counts are considered here. The defendants have moved to dismiss each of the counts. Numer-

ous briefs have been filed and an oral hearing was had on the motion to dismiss. The defendants were represented by Attorney General Michael T. Greely, Assistant Attorneys' General Mike McGrath and Mike McCarter and by Ross Cannon. The plaintiffs were represented by Patrick F. Hooks and William R. Glendon. Western Energy Company was represented by John Carl.

The complaints set out the basic claims in three separate counts.

Count I asserts that the severance tax is unconstitutional in that it is an undue burden on interstate commerce in that the tax bears no fair relation to the services and protection provided by the State of Montana to the coal mining activity.

Count II asserts that the severance tax is unconstitutional because it violates the Supremacy Clause of the Federal Constitution in that it substantially frustrates the congressional intended purpose to increase coal production as a substitute for oil energy.

Count III asserts that the coal severance tax is unconstitutional because it grossly distorts the compromise between the federal government and the states expressed in the Mineral Lands Leasing Act of 1920 and as amended by the Federal Coal Leasing Amendments Act of 1975, by appropriating a major part of the "economic rents" attributable to coal extraction thus frustrating federal policies.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

To all three counts the defendants have filed motions to dismiss on the ground that the complaint fails to state claims upon which relief may be granted.

In considering a motion to dismiss the Court is guided by the rule that a motion to dismiss will not be granted unless, as a matter of law, no facts can be **[3]** proven that will establish that plaintiffs are entitled to the requested relief. *Buttrell v. McBride Land and Livestock,* 171 M 296 (1976). But whether a complaint states a cause of action must be determined from allegations of fact and not from conclusions. *Coldwater v. State Highway Commission,* 118 Mont. 65.

In the approach to the question, and for the purpose of the motion only, the Court accepts as true the well pleaded facts of the claim. *Potter v. Miller,* 145 M. 197.

COUNT I.

This count alleges that:

1. The Coal Severance Tax is imposed on activities which substantially affect interstate commerce, that it violates the Commerce Clause of the United States because the amount of the tax bears no fair relation to the cost of services and protection afforded by the state to taxpayers, and that it discriminates against interstate commerce.

For the purposes of the motion to dismiss the defendants admit the truth of the claim but contend that the

allegations are not sufficient to state a claim against the defendants upon which relief may be granted.

The issue to be decided as to Count I is the scope and reach of the Commerce Clause of the United States Constitution. The issue arises from the widely disparate views of the parties as to whether a local activity such as mining of coal, is subject to the exclusive jurisdiction of the state for tax purposes? Or whether that activity for tax purposes is subject to scrutiny under the Commerce Clause when it has a substantial effect on interstate commerce.

The basis for defendants' contentions is that the taxable event, the severing of coal from the ground, is not an act of commerce, but is a purely local activity which is not reached by the Commerce Clause. The defendants rely on United States Supreme Court case law which is based upon what has been labeled as the "Heisler Trilogy" case study of three United States Supreme Court decisions, namely *Heisler v. Thomas Colliery Co.*, 260 U.S. 235 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927).

The plaintiffs here accept the reasoning of "Heisler Trilogy" and label the reasoning in those decisions as providing a "mechanical test" which does not apply **[4]** to the situation here, and as to which the United States Supreme Court no longer adheres.

The plaintiffs would characterize the "Heisler" rule as follows:

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

"*Heisler* employed a mechanical test to determine whether an activity was inter*s*tate or intr*a*state commerce. The test simply required the Court to find a 'point of time when they (goods) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation. . . .' *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 260-61 (1922). Under the reasoning of the *Heisler* Court, activities such as mining, manufacturing and agricultural production were on one side of this line and were thus said to be within the *exclusive* control of the state, and only the state could regulate or tax the activity. On the other side, the activity was *exclusively* within federal control. *Heisler's* mechanical test was perhaps most explicitly stated in *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936), where the Court used the test to strike down a federal law regulating mining activities:

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. *In respect of the former, he is subject only to regulation by the state; in respect of the*

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

latter, to regulation only by the federal government. (Emphasis supplied)

According to defendants, the *Heisler* trilogy cases are 'as valid today as they were when initially laid down.' (Tr. 7). They claim that, because of this mechanical test, the Coal Severance Tax is immune from any examination at all under the Commerce Clause (Tr. 17), without regard to the actual effect of the Tax on interstate commerce (Defendants' Reply Br. at 3), and that this would be so, even if the rate of tax were raised to 100% *ad valorem* (Tr. 84).

Plaintiffs take issue with these conclusions. They argue that the rationale of *Heisler* and like cases has been rejected and repudiated by later cases. (Plaintiffs' Br. at 22-35). They say that mining, manufacturing and agricultural production are not immune from Commerce Clause scrutiny. Plaintiffs trace an overall evolution in the development of the Commerce Clause since 1937, on the basis of which they argue that the breadth and scope of the Clause has expanded so that it now touches, and can be used to scrutinize for impermissible burdens, all activities which 'substantially affect' interstate commerce. Plaintiffs have further asserted that the Coal Severance Tax has such a 'substantial effect' on interstate commerce and is, therefore, subject to scrutiny.

Accordingly, the central issue before the Court is whether or not the 'mechanical test' of the *Heisler* trilogy has been retained by the Supreme Court's

> opinions since that time or has been supplanted, as the plaintiffs claim, by a 'substantial effects' test. The two tests are fundamentally different in several respects. The test which plaintiffs claim should be **[5]** employed gives an expansive reading to the Commerce Clause; it involves a judicial balancing and accommodation of the competing state and federal interests involved. The power of the states and the federal government necessarily overlap under this test. Defendants' test, on the other hand, gives a very narrow scope to the Commerce Clause, and it would make the powers of each government exclusive in its own domain."

It is the wish of this Court to examine the principal decisions of the Supreme Court since the "Heisler Trilogy" cases to determine if the Supreme Court has expanded the reach of the Commerce Clause to effect a control of the taxing authority of a state of a local activity.

Under the theory of the plaintiffs that the so-called "Mechanical Test" has been supplanted by "substantial effect on commerce" test this Court would necessarily have to deny the motion to dismiss and proceed to a factual determination.

The plaintiffs do not contend that the State may not tax an activity which has a substantial effect on interstate commerce. They do contend, however, that the tax has to bear a fair relationship to the cost impact such activity

has on the taxpayers of the state. If such be the law then a factual determination is necessary.

The parties disagree as to the interpretation of later Supreme Court decisions as to their effect on the *Heisler* rule.

1922

The taxable event in *Heisler v. Thomas Colliery Co.*, was anthracite coal mined, washed, screened or otherwise prepared for market. Over the contentions that Pennsylvania had a monopoly on anthracite coal which was a prime necessity of other states, and that the tax was a collection of tribute from other states, the Supreme Court held that the taxable event was not a regulation of commerce and was exclusively governed by domestic law and not governed and protected by the national law of commerce regulations until the goods commence their final movement for transportation from the state of their origin to that of their destination.

1923

The taxable event in *Oliver Iron Co. v. Lord, et al.*, was the occupation of those "engaged in the business of mining or producing iron ores or other ores." The chief contention was that mining, as conducted by the plaintiffs, if not actually a part of interstate commerce, was so closely connected therewith that to tax it is to burden or

interfere with such commerce, something a state cannot do under the **[6]** Commerce Clause of the United States Constitution.

As in the *Heisler* case, the argument was that the demand or market for the ore outside the state. The Supreme Court held that mining is not interstate commerce but, like manufacturing, is a local business subject to local regulation and taxation. Its characteristic in this regard is intrinsic, is not affected by intended use or disposal of the product, is not controlled by contractual engagements and persists even though the business be conducted in close connection with interstate commerce.

1927

The taxable event in *Hope Natural Gas Company v. Hall* was the business of producing natural gas in the state, upon which activity an "annual privilege tax" was assessed. The business was the production and purchase of natural gas in West Virginia, and the continuous and uninterrupted transportation of this through pipe lines to other states. The Supreme Court of the United States approved a lower court's decision that the value of the gas must be computed before it enters the stream of interstate commerce. It was admitted that there was no violation of the Commerce Clause when the state lays a privilege or occupation tax upon producers of natural gas reckoned according to the value at the well head, because production is a purely local activity.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

1933

The tax event in *Minnesota v. Blasius,* 290 U. S. 1 concerned the shipment of livestock to the St. Paul market. The Supreme Court held that while a state may not tax items in the current of interstate commerce yet under the facts the transportation had ceased and when Blasius received the cattle, put them in his own pens, where he could sell to buyers within or without the state, the "cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest. There was no federal right to immunity from the tax."[1]

1936

Carter v. Carter Coal Co., 298 U.S. 238 concerned a Federal statute, the "Bituminous Coal Conservation Act of 1935." The question was whether the labor [7] provisions of the act could be upheld as an exercise of the power to regulate commerce. The thrust of the legislative averment was that production and distribution by producers of such coal bear upon and directly affect interstate commerce and render regulation of production and

---

1 This case is corollary to the *Heisler* cases but instead of activity prior to entering the stream of interstate commerce is one in which interstate commerce had ceased.

distribution imperative for the protection of such commerce. The act was struck down when the court held:

> "One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally related or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell or ship, the commodity to customers in another state, he engages in interstate commerce. In respect to the former, he is subject only to the regulation by the state; in respect to the latter, to regulation only by the federal government. *Utah Power and Light Co. v. Pfost,* 286 U.S. 165, 182. Production is not commerce, but a step in preparation for commerce. *Chassaniol v. Greenwood,* 291 U.S. 584, 587."

1936

National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1. The involvement considered was a violation by Jones and Laughlin of the National Labor Relations Act by engaging in unfair labor practices affecting commerce. Section 10(a) of the act provided "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." The contention of *Jones-Laughlin* was that the act was

beyond the reach of Congress. The Supreme Court reasoned as follows:

> "The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce'. The Act specifically defines the 'commerce' to which it refers (§ 2(6)):
>
> "The term commerce means trade traffic, commerce, transportation, or communication among the several states, or between the District of Columbia or any Territory of the United States, and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country:
>
> "There can be no question that the commerce thus contemplated by The Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term 'affecting commerce' (§ 2(7)):
>
> "The term 'affecting commerce' means in commerce a burdening or **[8]** obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

"This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend beyond the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effect upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."

The Supreme Court held the act constitutional.

The plaintiffs here take the position that the Heisler Trilogy rule, although not specifically overruled by Jones and Laughlin, is overruled by implication. The defendants characterize the Jones and Laughlin decision as not applicable since it dealt with a situation in which Congress had acted, specifically enacting legislation applied to activities which "affect commerce", which is not the situation considered here.

1940

The event in *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381 involved the Bituminous Coal Conservation

Act of 1937 which provided for regulation and sale of bituminous coal. The Act was upheld on the basis that the regulatory provisions of the Act were within the Commerce power; they apply only to sales or transactions in, or directly or intimately affecting, interstate commerce. The Sunshine Coal Company was the lessee of coal lands in Arkansas and was engaged in the business of mining and shipping coal. The Supreme Court held "The regulatory provisions are clearly within the power of Congress under the Commerce Clause of the Constitution; * * * The fixing of prices, the proscription of unfair trade practices, the establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the Commerce Clause." This case is an outgrowth of *Carter v. Carter Coal Co.*, after the Act had been amended.

1941

The event in *United States v. Darby,* 312 U. S. 100 was the U. S. Fair Labor Standards Act of 1938 and its fixing of minimum wages and hours. The questions **[9]** presented were "first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and second, whether it has the power to prohibit the employment of workmen in the production of goods for interstate commerce at other than prescribed wages and hours."

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

As to the first question the Supreme Court held that "while manufacturing is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipments by Congress is indubitably a regulation of commerce."

As to the second question the Court held:

> "While this Court has many times found state regulation of interstate commerce, where uniformity of its regulation is of natural concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the court has never implied such restraint on state control over matters of intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. *Minnesota Rate Cases,* 230 U. S. 352, 398 et seq., and cases cited: 410 et seq., and cases cited. In the absence of congressional legislation on the subject laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. *Kidd v. Pearson,* 128 U.S. 1; *Bacon v. Illinois,* 227 U.S. 504; *Heisler v. Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co. v. Lord,* 262 U. S. 192.
>
> "But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce."

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

The Supreme Court upheld the application of the Act's provisions.

1942

The event in *Wickard v. Filburn,* 317 U. S. 111 involved the U. S. Agricultural Adjustment Act of 1938. A farmer sought to enjoin enforcement against himself of the penalty imposed on that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. His argument was that the marketing provisions of the act applicable to him were unconstitutional because not obtainable under the Commerce Clause. He urged that the marketing quotas were a regulation of production and consumption of wheat. (The excess wheat was grown for his own consumption.) The thrust of the opinion is that Congress has, under the Commerce Clause, the power to regulate local activity if such activity "exerts a **[10]** substantial economic effect on interstate commerce."

1943

The event in *Parker v. Brown,* 317 U. S. 341 involved the California Agricultural Prorate Act and whether it was rendered invalid under the United States Sherman Act or by the United States Agricultural Marketing Agreement Act of 1937. The declared purpose of the California Act was to "conserve the agricultural wealth of the State" and "to prevent economic waste in the market-

ing of agricultural products" of the State. The Supreme Court held that the California activity was not within the reach of the Commerce Clause and said:

> "This court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the States the authority to regulate commerce with respect to matters of local concern, in which Congress has not spoken. (Citing cases) A fortiori there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operation which are within the regulatory and taxing powers of the States, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a State and then sold and shipped out of it—or whether we consider only the powers of the state in the absence of congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce—we think the present regulation is within state power."

In reference to the "mechanical test", the Court went on to say:

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

"But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the powers thus granted with that reserved to the state is to be attained by the accommodating of the competing demands of the state and the national interests involved."

1946

The event in *Nippert v. City of Richmond,* 327 U. S. 416 involved a municipal ordinance on persons engaged in the business of soliciting. The tax was struck down as violative of the Federal Commerce Clause because it had the possibility of discriminating between an "instate" and an out-of-state merchant. The Court said:

"There is no lack of power in the state or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent **[11]** trends in this field. *McGoldrick v. Berwind-White Co.,* supra. But this does not mean, and the trends do not signify, that the state or municipal governments may devise a tax applicable to all commerce alike, which strikes down or discriminates against large volumes of that commerce in order to reach other portions as to which the application of the tax

would produce no such consequences, or only negligible ones. Other types of tax are available for reaching both portions which do not involve the forbidden evils or the necessity for putting them upon some commerce in order to reach the other. The problem comes down therefore to whether the state or municipal legislative bodies in framing their tax measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce actually up on a plane of equality with local trade in local taxation, not as is said to a question of whether interstate trade shall bear its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business."

"The tax here in question inherently involves too many probabilities, and we think activities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one."

The Court pointed out the artful method used by the taxing authorities to make such discrimination possible and condemned the use of a "local incident" to justify the discrimination. The Court said:

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as

> separate and distinct from the transportation or intercourse which is the commerce itself and then lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial effects of the tax upon commerce."

The plaintiffs here contend that this is the pronouncement of the Supreme Court which, in effect, overrules the Heisler cases. This Court does not so view the Nippert case. The *Nippert* case is squarely one of discrimination which is not the issue in the case under consideration here. It may be true that the tax adds to the cost of the coal to the ultimate consumers but there is no discrimination between out-of-state consumers and in-state consumers, insofar as the tax is concerned.

1948

The event in *Memphis Gas vs. Stone,* 335 U. S. 80 was a state franchise tax or excise tax on the value of capital used, invested or employed in Mississippi by the Memphis Natural Gas Co., whose business was exclusively interstate. Challenge was made as to the validity of the tax under the Federal Commerce Clause. The Supreme Court affirmed the Mississippi court upon the grounds that the tax was a recompense **[12]** for the state's protection of the petitioners local interstate activities.

The Court characterized the factual situation as follows:

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

"The facts of this case present again the perennial problem of the validity of a state tax for the privilege or [sic], within a state, certain activities admittedly necessary to maintain or operate the interstate business of a taxpayer. * * * The states have sought by taxation to collect from the instrumentalities of commerce compensation for the protection and advantages rendered to commerce by state governments. The federal courts have sought over the years to determine the scope of a state's power to tax in the light of competing interests of interstate commerce, and of the states with their power to impose reasonable taxes upon incidents connected with that of commerce."

1954

The event in *Michigan-Wisconsin Pipe Line v. Calvert,* 347 U. S. 157 concerned two natural gas pipe line companies which carried on an interstate business and a tax levied not on the capture or production of the gas but rather on its taking into interstate commerce after production. The tax was declared invalid because it was the type of tax that could be levied by each state through which the pipe line ran and would in effect establish custom [sic] barriers that the Commerce Clause was designed to eliminate. The Court said:

"It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part

of the interstate process, the flow of commerce, that it cannot be separated from it (citing cases). And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce."

"The problem in this case is not whether the State could tax the actual gathering of all gas whether it is transmitted in interstate commerce or not, cf. *Hope Natural Gas Co. v. Hall,* supra, but whether here the state has delayed the incidence of the tax beyond the step where productions have ceased and transmission in interstate commerce has begun."

1961

The event in *Alaska v. Artic Maid,* 366 U. S. 199 was a license tax on freezer ships of 4% of the value of salmon. Artic Maid used freezer ships for the taking and preservation of salmon along Alaska's shores. The salmon were caught off the coast of Alaska by boats which Artic Maid owns or had under contract and by independent fishermen who sell salmon to Artic Maid. The salmon are frozen when received **[13]** aboard the freezer ships, and eventually they are taken to the State of Washington, where they are canned. The Supreme Court held, as applied to salmon taken in Alaska's territorial waters, the

tax was not invalid as a burden on interstate commerce in violation of the Federal Constitution. (The measure of the tax is not the taxable event, 366 U. S. at 202.)

The Supreme Court said:

> "The process of gathering fish either through the catcher boats that are a part of respondent's fleet or through independent operators is a 'local activity' (*Michigan-Wisconsin Pipe Line Co. v. Calvert,* supra, 166) in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer v. Witsell,* supra) and the exhaustion of ore (*Oliver Iron Mining Co. v. Lord,* 262 U. S. 172) are not dispositive of this controversy. The *Oliver Iron* case is indeed a first cousin of the present case. Here, as there, the tax is an occupation tax. Here as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate Market."

1969

The event in *Dunbar-Stanley Studios, Inc. v. Alabama,* 393 U. S. 587 was a tax on photographers for each county, town or city where he operates. In the case of a photographer or gallery "at a fixed location" the maximum tax was $25.00 in largest cities. The tax was $5.00 per year for a transient photographer. The transient photographer contended that the Federal Commerce Clause barred the imposition of the transient

photographer's tax on its activities. The Supreme Court held that the tax was constitutionally permissible. The transient photographer's activities were limited to taking pictures at J. C. Penney's stores in Alabama and transmitting the exposed film to an office in North Carolina where the film was developed and finished and returned to the Penney stores in Alabama. The Court said:

> "It could hardly be suggested that if J. C. Penney had set up its own resident or transient photography studios, using its own employees, such a photography business would have been exempt from State taxation merely because it chose to send the exposed film out of the state for processing.
>
> "The extraction of a natural resource within a state is not immunized from state taxation merely because, once extracted, the product will be immediately shipped out of state for processing and sale to consumers. *Alaska v. Artic Maid,* supra, at 203-204; *Oliver Iron Mining Co. v. Lord,* 262 U. S. 172, 177-79 (1923 cf. *Toomer vs. Whitsell,* 334 U. S. 385, 394-395 (1948)."

1970

The event in *Pike v. Bruce Church, Inc.,* 397 U. S. 137 concerned the Arizona **[14]** Fruit and Vegetable Standardization Act which was designed to prevent deceptive packaging. The State issued an order prohibiting the company from shipping its cantaloupes outside the state

unless they were packed in containers in a manner approved. The Supreme Court held that the order burdens interstate commerce since the cantaloupes were destined to be shipped from Arizona to an ascertainable location in California immediately after harvest, and the application of the challenged statute would require an operation then conducted outside the state to be performed within the state so it could be regulated there. The act required that all cantaloupes grown in Arizona and offered for sale must be packed in regular compact arrangements in closed standard containers approved by the supervisors.

The Court said:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

1976

The event in *National League of Cities v. Usery,* 426 U. S. 833 involved the Federal Fair Labor Standards Act which in 1974 was amended so as to extend the Act's minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

The Court held the amendments not within the authority of Congress granted by the Commerce Clause. The Supreme Court overruled the language in *Wirtz* (421 U. S. 548) as follows:

> " '[We] look to activities in which the states have habitually engaged as marking the boundary of restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.' "

The opinion then went on as follows:

> "But we have reaffirmed today that the States as States stand on quite a different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from *United States v. California,* simply wrong. Congress may not exercise that power so as to force directly upon the State its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of **[15]** power, if unchecked, would indeed, as Mr. Justice Douglas contended in his dissent in *Wirtz,* allow 'the National Government [to] devour the essentials of state sovereignty.' "

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

1976

The event in *Great Atlantic & Pacific Tea Co. v. Cottrell,* 324 U. S. 277 involved a Mississippi regulation that milk and milk products from another state may be sold in Mississippi only if the other state accepts milk and milk products produced in Mississippi on a reciprocal basis. The regulation was challenged on the basis that it violated the Federal Commerce Clause. A District Court holding the regulation valid as an exercise of the State police powers even though it incidentally burdened interstate commerce, was reversed by the U. S. Supreme Court. The Court ruled that this regulation was mandatory and presented a situation where "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."

1977

The event in *Complete Auto-Transit v. Brady,* 430 U. S. 274 involved a Mississippi tax on the privilege of doing business in the state. The opinion commenced with the following language:

> "Once again we are presented with 'the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities related to a corporation's operation of an interstate business.' "

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

The taxes in question were sales taxes assessed to a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation. The tax was upheld by the Supreme Court.

The Supreme Court rejected the rule of *Spector Motor Service, Inc. v. O'Connor* that a state tax on the "privilege of doing business" is per se unconstitutional when it is applied to interstate commerce. The Court adopted the language of *Western Livestock v. Bureau of Revenue,* 303 U. S. 250 (1938) as follows:

> "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of State tax burden even though it increases the cost of doing business."

The Court commented on the *Spector* rule as follows:

> "This rule looks only to the fact that the incidence of the tax is 'the privilege of doing business'; it deems irrelevant any consideration of the practical effect of the tax."

[16] On the basis that interstate commerce must pay its way, the Court approved the rule "that net income from the interstate operations of a foreign corporation may be subject to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the State forming sufficient nexus to support the tax."

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

1977

The event in *Philadelphia v. New Jersey,* 437 U. S. 617 was a New Jersey statute which prohibited the importation of solid or liquid waste which was originated or collected outside the state. It was argued that there was no commerce because the waste was valueless. The Court held that all objects of interstate trade merit Commerce Clause protection and none is excluded from the definition at the outset. The Court held that "Congress has power to regulate the interstate movement of these wastes, states are not free from Constitutional scrutiny when they restrict that movement."

1978

The event in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U. S. 734 was a business and occupation tax taxing the interstate activity of stevedoring within the State. It was pointed out that stevedoring is essentially a part of interstate commerce and since there was no showing that, under the *Complete Auto* reasoning, the tax was discriminatory, or did not have sufficient nexus to the state, was not fairly apportioned or fairly related to services provided by the State, the tax was upheld.

1979

The event in *Hughes v. Oklahoma,* ____ U. S. ____, decided April 24th, involved an Oklahoma statute prohib-

iting the transportation or shipping for sale natural minnows from the waters of Oklahoma to points outside the state. The Supreme Court held that the statute discriminates against interstate commerce and blocked the flow of commerce at the state's border. The Supreme Court overruled *Geer v. Connecticut,* 161 U. S. 519 (1896) upholding the right of Connecticut to prohibit the exportation of game birds killed within the state on the ground that the birds never entered the stream of commerce and that therefore only internal commerce, rather than interstate commerce, was affected by the statute. The Court said:

> **[17]** "The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of 'conserving' the wild animals within its borders when equally effective nondiscriminatory measures are available."

The Supreme Court cases decided since the *Heisler, Oliver* and *Hope* cases appear to this Court to be, depending upon the activity involved, properly allocated in four categories, to-wit: (1) When Congress has asserted its regulatory powers under congressional acts[1]; (2) When the state engages in regulatory activity of interstate com-

---

1 National Labor Relations Board v. Jones and Laughlin Steel Corp. (supra); Wickard v. Filburn (supra); National League of Cities v. Usery (supra); United States v. Darby (supra); Sunshine Anthracite Coal Co. v. Adkins (supra); Carter v. Carter Coal Co. (supra); Parker v. Brown (supra).

merce[2]; (3) When the state imposes a tax on interstate commerce activity[3]; (4) When the state imposes a tax on an activity which is not in commerce[4]. The thrust of the plaintiffs' argument is that there is but one definition of commerce and that the Commerce Clause involves and authorizes congressional action, an affirmative effect and a restriction on state activities, a negative effect. It is contended that any activity which "substantially affects" commerce is subject to the scrutiny and the reach of the Federal Commerce Clause.

Since our present economy involves inter-relationships between the local and national level, it is difficult to conceive of any activity which does not have some effect on interstate commerce and thus, if the plaintiffs' position is correct we do have a situation in which the control of all activities is within the umbrella of the Federal Commerce Clause, whether it be by affirmative application or negative application. The plaintiffs, however,

---

2 Pike v. Bruce Church, Inc. (supra); Great Atlantic & Pacific Tea Co. v. Cottrell (supra); Philadelphia v. New Jersey (supra); Hughes v. Oklahoma (supra).

3 Nippert v. City of Richmond (supra); Memphis Gas v. Stone (supra); Michigan-Wisconsin Pipe Line v. Calvert (supra); Complete Auto-Transit v. Brady (supra); Spector Motor Service, Inc. v. O'Connor (supra); Dept. of Revenue of Washington v. Association of Washington Stevedoring Companies (supra); Dunbar-Stanley Studios, Inc. v. Alabama (supra).

4 Heisler v. Thomas Colliery Co. (supra); Oliver Iron Co. v. Lord (supra); Hope National Gas Co. v. Hall (supra); Alaska v. Artic Maid (supra); Minnesota v. Blasius (supra).

contend that only those local activities which have a "substantial" effect on commerce are within the reach.

It is the opinion of this Court that the United States Supreme Court has not **[18]** adopted the view of the plaintiffs and that insofar as the negative effect on local activities the Supreme Court is still adhering to the threshold question as to whether the local activity is an act of commerce. The so-called "mechanical test" of the Heisler cases has been followed as recently as 1961 and 1969. (*Alaska v. Artic Maid* (supra) and *Dunbar-Stanley Studios, Inc. v. Oklahoma* (1969)).

However, when a state imposes a tax on interstate commerce as demonstrated by the cases cited in Note 3, the Supreme Court has fashioned a rule that is premised on the idea that activities of interstate commerce must bear a fair share of the burden upon a state because of such activity. If the tax (under the cases under Note 3) has a substantial effect on interstate commerce it will be upheld if (a) the tax is applied to an activity with a substantial nexus with the taxing state; (b) is fairly apportioned; (c) does not discriminate against interstate commerce and (d) is fairly related to the services provided by the state.

The plaintiffs assert that this rule applies here. This Court does not agree. The application of this rule would assume that the event here affects commerce within the purview of the cases cited under Note 3. Such is not the effect of those cases for in those cases there was no

question but that the tax was on an "interstate commerce" activity while here the tax can not be said to be an interstate commerce activity. To extend the rule of the cases of Note 3 to the tax here would, in the opinion of this Court, not be warranted and would be contrary to the cases of Note 4.

Since Congress has not asserted its commerce power as demonstrated by cases under Note 1 and since the tax here is in no sense regulatory as demonstrated by cases under Note 2 there is no further need to discuss them.

The plaintiffs contend that the Montana Coal Severance Tax is discriminatory. This contention is not tenable since the tax is imposed on the coal that is produced in the state by Montana or out-of-state companies, without regard to its consumption either in Montana or out of Montana.

It is the opinion of this Court that the complaint after application of the law as decided by the Supreme Court of the United States does not state a cause of action as to which the relief sought may be obtained.

The motion to dimiss Count One of the complaint is granted.

[19] *COUNT II.*

Count II alleges that Congress has enacted legislation which encourages the use of coal to meet the nation's energy requirements and that the Coal Severance Tax

substantially frustrates and impairs fulfillment of these national policies.

The complaint alleges that the tax is unconstitutional under the Supremacy Clause of the United States (ARTVI) which, in part, reads as follows:

> "This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land * * *."

The thrust of plaintiffs' allegations is that the tax increases the cost of Montana coal and thus lessens the possibility of its use as a substitute for oil.

The defendants contend in support of their motion to dismiss that before reliance may be had under the Supremacy Clause of the Federal Constitution there must be allegations as to a conflict between the state law and specific federal statutes or regulations.

The plaintiffs contend that it is not necessary that there be a direct and specific conflict between state and federal statutes and that allegations of "substantial frustration" are sufficient.

The issue necessarily involves the congressional enactments and the congressional intent as to whether the congressional enactments have precluded the states from imposing a severance tax on mining activities within its borders.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

The Court has heretofore asked the parties to submit to the Court the items bearing on the question, and as to which this Court can judicially notice, and therefrom make a determination as a matter of law as to whether the complaint states a cause of action upon which the relief sought may be had.

A review of the items submitted by the parties discloses a deep concern by the Executive and by Congress as to the world-wide oil situation.

Facing Congress were problems of readjustment of energy use, shifting from less dependence on oil and natural gas and more dependence on coal. While oil was plentiful the nation was using oil in home heating, manufacturing, production of electricity and transportation. The Congress had theretofore concerned itself with air quality and had enacted legislation to achieve a better national air quality and the use of coal to supply energy presented the problem of air quality being lowered. **[20]** Congress took note of the fact that, for air quality, low sulfur coal would produce less air contamination. Western coal, as compared to midwestern and eastern coal was of less sulfur content. However the greater use of western coal and lesser use of midwestern and eastern coal would cause economic problems in the midwest and the east. To achieve the goals of the Congress, it enacted statutes which would act as incentives to promote the use of coal and other non-oil based forms of energy. The statutes are as follows:

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

Power plant and Industrial Fuel Use Act of 1978
Pub. Law No. 95-620, 92 Stat. 3289

Natural Gas Policy Act of 1978
Pub. Law No. 95-621, 92 Stat. 3350

Energy Conservation and Production Act
Pub. Law No. 94-385, 90 Stat. 1125

Energy Policy and Conservation Act of 1975
Pub. Law No. 94-163, 89 Stat. 871

Federal Non-Nuclear Energy Research and Development Act of 1974
Pub. Law No. 94-577, 88 Stat. 1878

Energy Reorganization Act of 1974
Pub. Law No. 93-438, 88 Stat. 1233

Energy Supply and Environmental Coordination Act of 1974
Pub. Law No. 93-319, 88 Stat. 246

Emergency Petroleum Allocation Act of 1973
Pub. Law No. 93-159, 87 Stat. 627

Clean Air Amendments of 1970
Pub. Law No. 91-604, 84 Stat. 1676

This Court, therefore, for the purposes of the motion to dismiss finds the activity of Congress directed toward incentives to use coal as a substitute for the use of oil.

Plaintiffs contend that the tax "substantially frustrates and impairs" the goals of the national policy and seeks to

present economic evidence which they contend will demonstrate that the Montana tax will lessen the use of coal and therefore "frustrate" the national policy.

The defendants contend that the preemptive force of the national coal policies are in the first instance a matter of law which must be established by reference to federal statutes and legislative history. With this position the Court agrees. The defendants contend that there is no national policy which requires the **[21]** limitation or elimination of state coal severance taxes and that the economic effect on the price of coal is irrelevant.

The United States Supreme Court has dealt with the Supremacy Clause application to factual situations. The criteria has been stated in various words some of which could be said not consistent with the others depending upon the use of words to the facts involved.

In *Farmers Education & Coop Union v. W. Day, Inc.*, 360 U.S. 525 (1959) the court said:

> "A determination of suppression of state law rests on legal and political presuppositions which should be made explicit and not left clouded. States should not be held to have been ousted from power traditionally held in the absence of either a clear declaration by Congress that it intends to forbid the continued functioning of the state law or an obvious and unavoidable conflict between the federal and state directives."

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

In *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 524 (1973) the court said:

> "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question * * * Control of noise is of course deep-seated in the police power of the State. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no reason for local curfews or other local controls * * *"

In *DeCanas v. Bica,* 424 U.S. 351 (1976) the court said:

> "Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by § 2805(a) in a manner consistent with pertinent federal law. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was 'the clear and manifest purpose of Congress' would justify that conclusion."
>
> * * *
>
> "Respondents have not made that demonstration. They fail to point out, and an independent review

does not reveal any specific indication in either the wording or the legislative history of INA that Congress intended to preclude even harmonious state regulation touching on aliens in general or the employment of illegal aliens in particular."

[22] In *Hines v. Davidowitz,* 312 U.S. 52 (1941) the court said:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: Conficting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expression provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.
>
> "In general, the states may exercise any power possessed by them prior to the adoption of the Constitution unless the exercise of such power is expressly or by necessary implication prohibited thereby or interferes with some power delegated to the United States."

In *McGoldrich v. Gulf Oil Corp.,* 309 U.S. 414 (1940) the City of New York levied a sales tax on the sale of fuel oil manufactured in New York City from crude petroleum, which had been imported from a foreign country to

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

New York and there sold and delivered as ship's stores to vessels engaged in foreign commerce. The Gulf Oil Corporation contended that the New York statute conflicted with Section 630 of the Revenue Act of 1932, aided by amendments of June 16, 1933, 48 Stat. 256, declaring "that no tax under § 601 shall be laid 'upon any article sold for use as fuel supplies, ship's stores . . . on vessels . . . actually engaged in foreign trade.' " The Court said "The Congressional regulation, read in the light of its purpose is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the import merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ship's stores and shall not become subject to the state taxing power." * * * The state tax in the circumstances must fail as an *infringement of the congressional regulation of commerce.*" (emphasis supplied)

The United States Supreme Court held in the case of *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316 (1819) (the landmark decision establishing the supremacy rule) that Congress, when acting within its constitutional limits, has supremacy over states. However such supremacy must occur in the enactment of laws which the U.S. Constitution gives Congress the power to enact. Here no challenge has been made as to whether in the energy acts of the U.S. Congress is within the Congressional granted power. The principle cases relief [sic] upon by plaintiffs and the use of the Supremacy Clause involve specific grants of power to the Congress, **[23]** namely, Federal Regulation of Immigration—Federal power to levy and

collect taxes—Federal power to regulate Interstate Commerce—Federal power to borrow money—Federal power to establish Uniform Bankruptcy laws—Federal Indian jurisdiction.

Assuming the energy policy acts are something more than incentive legislation and are within the grant of power to the United States Congress it appears from the United States Supreme Court decisions that there are generally three situations for the pre-emption of state action:

(1) Where Congress has expressly prohibited state action. The items judicially noticed as supplied by the parties in no instance prohibit the states from its taxing authority.

(2) Where Congressional action clearly and unmistakeably shows the intent of Congress to prohibit state action. Here none of the items considered show such clear and unmistakeable intention.

(3) Where a state statute conflicts with a federal enactment and stands as a direct obstacle to its execution.

Plaintiffs concede that national policies must be determined by examining federal statutes, together with appropriate "legislative history, committee reports, administrative statements, regulations and the like." The scope and substance of national policies are matters of statutory interpretation. The types of "evidence" which form the

basis for statutory interpretation are matters of law and do not require the taking of testimony. For purposes of a motion to dismiss a court is not required to accept plaintiffs' allegations of law and legal conclusions are true. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 57 (1938); *Mitchell v. Archibald & Kendall, Inc.,* 573 F.2d 429, 432 (7th Cir. 1978); *Kadar Corp. v. Milbury,* 549 F.2d 230, 233 (1st cir. 1977); *Blackburn v. Fisk University,* 443 F.2d 121, 124 (6th Cir. 1971).

In the case of the Clean Air Act Amendments of 1977, the specific provisions of the Act, along with legislative history, demonstrate that the Congress favored and intended to encourage production and use of high-sulfur Eastern and Midwestern coal at the expense of low-sulfur Western coal. The legislative history reflects to an extent Congressional dissatisfaction with the use of low-sulfur Western coal to meet air emission standards. House and Conference Committee reports further reflect a Congressional intent to (1) reduce reliance upon Western coal and (2) promote expanded use of high-sulfur Eastern and Midwestern coal. Low-sulfur Western coal was **[24]** relegated a more limited role, to be used principally by existing facilities for which technological upgrading of air pollution control equipment is unfeasible or impractical. Specific provisions were enacted to implement those proposals, the most important of which are found in 42 U.S.C. §§ 7411 and 7425.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

Section 7411, as amended in 1977, has the effect of preventing specified new fossil fuel fired stationary sources from meeting air pollution emission standards by merely burning untreated low-sulfur coal. It requires "application of the best technological system of continuous emission reduction" for all new stationary sources. Thus, new sources using low sulfur coal must further reduce already low sulfur emissions by utilizing the best available anti-pollution equipment and techniques. The intent of Congress in adopting this requirement is expressed in the House Report: (*Congressional and Administrative News* 95th Congress, 1977 Session, Vol. II, pp. 1245.)

> "Actually, the committee has designed this proposal to strengthen demand for and use of this Nation's abundant supply of coal. The prevention of significant deterioration policy combined with section *111* revision of existing new source performance standards (to require new major pollution sources to use best technological system of continuous emission reduction [considering costs, energy, et cetera]') will help strengthen incentives for new plants to use locally available coal plus best available control technology. As EPA's 'Preliminary Economic Analysis . . .' (pp. 1-3 and V-6) concluded: 'Therefore, some plants especially those in the Midwest, which formerly were planning to import western low-sulfur coal in order to meet the requirements of the Clean Air Act will find it more economical to use local

high-sulfur coal and install a scrubber. As a result, the demand for Midwestern coal will increase by 25 million tons or by 20 percent.

Present new source performance standard regulations do not require use of any pollution control technology when a source burns very low-sulfur coal. While this promotes the use of low-sulfur coal and drives up the price of the coal, it means that billions of tons of medium and high-sulfur coal (located predominantly in the Midwestern and Eastern United States) remain in the ground, unmined."

Section 7425, as amended, has a similar purpose. See "The Clean Air Act Amendments of 1977: A Selective Legislative Analysis", 13 Land and Water L.R. 747, pp. 800-812. It grants the Governor of an affected state, the Environmental Protection Agency, and the President authority to prohibit a major fuel burning stationary source "from using fuels other than locally or regionally available coal or coal derivatives to comply with implementation plan requirements." This **[25]** prohibition may be effected upon a finding that the action "is necessary to prevent or minimize significant or regional economic disruption or unemployment . . ."

Thus, the specific provisions of the Act, along with accompanying legislative history, show a continued Congressional consideration for the regional interests of the Midwestern and Eastern states, and specifically for use of

high-sulfur Midwestern and Eastern coal at the possible expense of the use of low-sulfur Western coal.

Similarly, a look at the provisions of the "Energy Policy and Conservation Act of 1975" and its legislative history reveals no clear national policy demanding the use of Montana coal. 42 U.S.C. 6201 provides:

"The purposes of this chapter are—

(1) to grant specific stand-by authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program;

(2) to provide for the creation of a strategic Petroleum Reserve capable of reducing the impact of severe energy supply interruptions;

(3) to increase the supply of fossil fuels in the United States, through price incentives and production requirements;

(4) to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses;

(5) to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products;

(6) to reduce the demand for petroleum products and natural gas through programs designed to pro-

vide greater availability and use of this Nation's abundant coal resources; and

(7) to provide a means for verification of energy data to assure the reliability of energy data.

Initially, a reading of this Act shows that it is not limited to coal. Section 6201(3) sets out a statement of policy encouraging increased production of all domestic "fossil fuels."

Further, the Act provides specific methods for implementation of its general statements of policy. Among the methods adopted are incentives for development of underground coal mines, 42 U.S.C. § 6211; provision for export restrictions, 42 U.S.C. § 6212; and the creation of a strategic coal and other fossil fuel reserves, 42 U.S.C. § 6231 et seq. None of the methods adopted prohibit state severance taxes or nullify other state and federal regulations, taxes or policies which may increase costs of coal production and use.

[26] Reference to other federal statutes dispels any notion that in establishing domestic energy policies, Congress intended to nullify other national, state, local or individual policies or interests which may increase the costs of coal production and use. For example, miners of low-sulfur coal are not exempted from costly environmental strip mining regulations, see 42 U.S.C. §§ 1251 et seq., nor are they exempted from health and safety requirements under the "Federal Coal Mine Health and

Safety Act", 30 U.S.C. § 801 et seq; nor from royalties payable under the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. § 181, et seq. Moreover, Congressional findings in the "Surface Mining Control and Reclamation Acts of 1977", 30 U.S.C. §§ 1201 et seq., indicate a congressional preference for underground coal mining, contradicting any argument that Congress intended to promote strip mining of low-sulfur coal, in Montana or elsewhere, to the exclusion of environmental and other concerns.

Federal energy and environmental legislation is ultimately an amalgam of competing and often conflicting policies and interests; it is the product of compromise. The specific enactments of Congress fix the points of compromise and nothing in the statutes to which this Court's attention has been directed supports plaintiffs' contention that Congress intended to preempt state tax powers over coal or that a state tax is an obstacle to congressional policy because it increases coal costs.

If Congress intended to preempt the states' power to impose a tax on mining activity, and had the power to do so, it did not. A state tax is not an "obstacle" to federal policy in a constitutional sense merely because it increases the cost or price of a product, the use of which Congress encourages or favors.

The recent case of *Exxon v. Governor of Maryland,* 432 U.S. 117 (1978) summarily rejected a contention that broad, general national policy can preempt state laws which have some sort of indirect economic effect upon

the policy. In *Exxon,* plaintiffs claimed that a state statute prohibiting producers or refiners of petroleum products from operating retail service stations was invalid. They asserted that the law was anti-competitive and therefore conflicted with a national policy favoring "free competition":

> "Appellants point out . . . the . . . basic national **[27]** policy favoring free competition, and argue that the Maryland statute 'undermines' the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts. This is merely another way of stating that the Maryland statute will have an anti-competitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our 'charter of economic liberty.' *Northern Pacific R.R. Co. v. United States,* 356 U.S. 1, 4, 2 L.Ed.2d 545, 78 S.Ct. 514. Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if any adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to preempt the power of the Maryland Legislature to enact this law. (Emphasis added). 432 U.S. at 133-134.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

In the context of state tax powers, the United States Supreme Court has rejected arguments that an occupation tax upon an exchange broker dealing in foreign currency indirectly burdens foreign commerce, *Nathan v. Louisiana,* 8 Howard 73, 12 L.Ed. 995 (1850); it has consistently rejected attacks upon nondiscriminatory state taxes which have some indirect rather than direct effect upon interstate commerce, e.g., *McGoldrich v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 45-49 (1940); it has refused to extend federal sovereign immunity from state taxation to third parties even where the tax in question is ultimately borne by the United States, *United States v. Boyd,* 378 U.S. 39 (1964); it has rejected arguments that state taxation of property conflicts with federal taxing power because the tax may effectively destroy the property and therefore destroy a potential subject of federal taxation, *A. Magnano Co. v. Hamilton,* 292 U.S. 40 (1934); and it has upheld a nondiscriminatory gross receipts tax on an off-reservation resort operated by an Indian tribe against an argument that federal law prohibits every state tax which touches or affects a tribal enterprise. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). In each of these cases the Supreme Court has deemed the amount and ultimate impact of the challenged tax irrelevant under the Supremacy Clause.

> "* * * It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State

withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that **[28]** extent diminishes the subject upon which taxes may be laid. The States are, and they must ever be, co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

Union Pacific R. R. Co., v. Peniston, 85 U. S. 3,30-31 (1973): The principles of *Union Pacific* were restated in *Penn Dairies, Inc., v. Milk Control Commission of Pennsylvania,* 318 U.S. 261 (1943), which concluded:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. * * *" (footnotes omitted)

This Court is of the opinion, as a matter of law, that Congress has not and did not intend to preclude the State of Montana from imposing a tax on the mining activities within the state. The allegations of Count II of the complaint, in the light of the Congressional intent, are insufficient to state a cause of action.

The motion to dismiss Count II of the complaint is granted.

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

COUNT III.

The plaintiffs assert in Count III that the Coal Severance tax is invalid in that it "grossly distorts" the compromise between the Federal government and the states, expressed in the Mineral Lands Leasing Act of 1920 Pub. Law No. 146, 41 Stat. 437, as amended by the Federal Coal Leasing Amendment Act of 1975 Pub. Law No. 94377, 90 Stat. 1083 by appropriating directly to Montana a major part of the "economic rents" attributable to the exhaustion of federally-owned coal and thus frustrate the federal policies established by these policies.

The parties, pursuant to the Court's request, have submitted to the Court items of which the Court may judicially notice bearing on Congressional action and the legislative history.

The history of the legislation discloses a difference of opinion as to the production of coal in government lands.

The opinion of many of the Western congressmen was that instead of a leasing system, that the lands be sold to private interests or to the states. The opponents **[29]** of this view held that the coal producing lands should be retained by the United States under a leasing system.

The opposing views were expressed as follows:

> H.R.Rep. No. (668 Part 2) 63 Congress 2nd Session 6 (1914)
>
> "No matter how loudly and vigorously and repeatedly it may be proclaimed that these lands 'belong to all the people,' the fact remains that when

those States were admitted to the Union the United States Government entered into a solemn compact with each of them that the lands within their borders should be expeditiously and in an orderly manner disposed of to the settlers and be allowed to go into private ownership to help maintain the State government; and Congress has no moral, legal, or constitutional right to repudiate or violate that agreement—much less to wantonly impose excise duties upon our development."

Similarly, H.R.Rep. No 17 (Part 2), 64th Congress, 1st Session 8 (1916) (minority views) (Tab 33) states:

"The West is new and poor, and it is absolutely wrong for Congress to force the West to help support the East—at the same time depriving the West of many of its greatest sources of revenue by permanently withdrawing them from entry and preventing them ever going into private ownership and becoming subject to taxation for State and local governments. But, harsh as it is, it is not so much the disposition of the funds that we object to, as it is the permanent withdrawal from entry of these enormous resources, and the perpetual bureaucratic domination that will be exercised from Washington in their administration and control. It is the violation of what we deem are the inherent and equal rights of our Western States as sovereign States.

"Aside from the purely material questions involved there are those which go to the very founda-

tion, the very fundaments, of our form of government.

* * *

"Such legislation as is now proposed inevitably leads to an undermining of the sovereignty of the State; to a weakening of its power to sustain itself; to a confiscation of a part of the fruits of its natural resources; to a withholding of those resources from the possibility of taxation, thus increasing the burdens upon all other property within the State."

This was the background against which the compromise embodied in the 1920 Act was reached. The debate was firmly resolved in favor of retaining federal ownership in these mineral lands, for the benefit of the citizens of the entire country. Thus, Section 2 of the 1920 Act establishes a leasing program under the auspices of the Secretary of the Interior. (41 Stat. 438 § 2) The Act authorizes the Secretary to offer the coal lands of the United States for leasing, not for sale, and to award leases on such land on terms which he prescribes.

The Act also adopted a revenue sharing plan, whereby the states in which the **[30]** coal mining occurred would receive 37½% share of the rents and royalties derived by the federal government from the leasing system, to be used for the construction of public roads and schools (52½% of the revenues were assigned to a Reclamation Fund to reclaim the lands of the West; the remaining 10% went to the U. S. Treasury). *Mineral Lands Leasing Act*

of 1920, Ch. 85 § 35, 41 Stat. 450. This is the principal mechanism by which the states and the Nation were to divide the proceeds from this mineral wealth which had been reserved to the Nation as a whole.

The *Federal Coal Leasing Amendments Act of 1975* increased from 37½% to 50% the amount of federal royalty revenues which would be rebated to the states under the 1920 Act (Pub. L. No. 94-377, § 9(a)) and increased the minimum coal royalties on federally owned coal from five cents per ton to 12½% of the value of the coal mined (Pub. L. No. 94-377, § 7(a)) (Tab 35). The Amendments also permitted the states to spend their increased share of the royalties for purposes other than the construction and maintenance of public roads and the support of public schools. (Pub. L. No. 94-377, § 9(a)). See also H.R.Rep. No. 94-681, 94th Cong., 2nd Session (1976). With these exceptions, the 1975 Amendments continued the federal policies established by the 1920 Act and alleged in the complaint—the federal government was to continue to retain ownership of the coal lands, lease the mineral rights to private interests, and share the "economic rents" with the states in the proportion provided by the statute.

The plaintiffs contend that implicit in the compromise is a limitation on the States right to tax no further than the states legitimate needs.

The defendants contend as follows:

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

Although the Mineral Lands Leasing Act comprehensively regulates various aspects of the leasing of mineral deposits, including provisions for state royalties, nothing in the Act indicates an intention by Congress to preempt State taxation. In fact, the Act specifically leaves the States the authority to levy and collect taxes on the output of mines subject to leases. 30 U.S.C. § 189 provides:

> "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and **[31]** all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter. Nothing in this chapter shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property or assets of any lessee of the United States."

In this section, Congress explicitly recognized state authority to tax coal mined pursuant to federal leases.

Mid-Northern Oil Company v. Montana, 268 U. S. 45 (1925), affirming *Mid-Northern Oil Company v. Walker,* 65 Mont. 414, 211 P 353 (1922), carefully scrutinized 30 U.S.C. § 189. The Court held that:

> "Although the act deals with the letting of public lands and the relations of the government to the

lessees thereof, nothing in it shall be so construed as to affect the rights of the states, in respect of such private persons and corporations, to levy and collect taxes as though the government were not concerned." (268 U.S. at 49)

Continuing that analysis,

"In other words, the purpose of Congress was . . . to put beyond doubt the authority of the states to impose taxes upon lessees in respect of their property. . . "

In conclusion the Court held:

"No doubt, what Congress immediately had in mind was the necessity of making it clear that, notwithstanding the interest of the government in leased lands, the rights of the states to tax improvements thereon and the output thereof should not be in doubt . . . We think the proviso plainly discloses the intention of Congress that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." (268 U. S. at 50)

In the light of the authority to tax without limitation as provided in 30 U.S.C. § 189 and in the light of the reasoning in *Mid-Northern Oil Co. v. Montana* (supra) it is the opinion of this Court, as a matter of law, that the

District Court Order in the Consolidated Actions Dismissing Counts I-III of the Complaint— July 27, 1979

Mineral Lands Leasing Act of 1920 does not preempt or limit the right of the State of Montana to impose the tax on the mining activity. The cause of action of Count III fails to state a cause of action upon which the relief requested can be granted.

Count III must be and is dimissed.

Dated this 27th day of July, 1979.

PETER G. MELOY
District Judge

Clean Air Act Amendments of of 1977, Pub. L. No. 95-95 § 125, 42 U.S.C. § 7425

§ 7425. Measures to prevent economic disruption or unemployment

Determination that action is necessary

(a) After notice and opportunity for a public hearing—

(1) the Governor of any State in which a major fuel burning stationary source referred to in this subsection (or class or category thereof) is located,

(2) the Administrator, or

(3) the President (or his designee),

may determine that action under subsection (b) of this section is necessary to prevent or minimize significant local or regional economic disruption or unemployment which would otherwise result from use by such source (or class or category) of—

(A) coal or coal derivatives other than locally or regionally available coal,

(B) petroleum products,

(C) natural gas, or

(D) any combination of fuels referred to in subparagraphs (A) through (C),

to comply with the requirements of a State implementation plan.

Clean Air Act Amendments of 1977,
42 U.S.C. § 7425

Use of locally or regionally available coal or coal derivatives to comply with implementation plan requirements

(b) Upon a determination under subsection (a) of this section—

(1) such Governor, with the written consent of the President or his designee,

(2) the President's designee with the written consent of such Governor, or

(3) the President

may by rule or order prohibit any such major fuel burning stationary source (or class or category thereof) from using fuels other than locally or regionally available coal or coal derivatives to comply with implementation plan requirements. In taking any action under this subsection, the Governor, the President, or the President's designee as the case may be, shall take into account, the final cost to the consumer of such an action.

Contracts; schedules

(c) The Governor, in the case of action under subsection (b)(1) of this section, or the Administrator, in the case of an action under subsection (b)(2) or (3) of this section shall, by rule or order, require each source to which such action applies to—

(1) enter into long-term contracts of at least ten years in duration (except as the President or his designee may otherwise permit or require by rule or

order for good cause) for supplies of regionally available coal or coal derivatives,

(2) enter into contracts to acquire any additional means of emission limitation which the Administrator or the State determines may be necessary to comply with the requirements of this chapter while using such coal or coal derivatives as fuel, and

(3) comply with such schedules (including increments of progress), timetables and other requirements as may be necessary to assure compliance with the requirements of this chapter.

Requirements under this subsection shall be established simultaneously with, and as a condition of, any action under subsection (b) of this section.

Existing or new major fuel burning stationary sources

(d) This section applies only to existing or new major fuel burning stationary sources—

(1) which have the design capacity to produce 250,000,000 Btu's per hour (or its equivalent), as determined by the Administrator, and

(2) which are not in compliance with the requirements of an applicable implementation plan or which are prohibited from burning oil or natural gas, or both, under any other authority of law.

Clean Air Act Amendments of 1977,
42 U.S.C. § 7425

Actions not to be deemed modifications of major fuel burning stationary sources

(e) Except as may otherwise be provided by rule by the State or the Administrator for good cause, any action required to be taken by a major fuel burning stationary source under this section shall not be deemed to constitute a modification for purposes of section 7411(a)(2) and (4) of this title.

Treatment of prohibitions, rules, or orders as requirements or parts of plans under other provisions

(f) For purposes of sections 7413 and 7420 of this title a prohibition under subsection (b) of this section, and a corresponding rule or order under subsection (c) of this section, shall be treated as a requirement of section 7413 of this title. For purposes of any plan (or portion thereof) promulgated under section 7410(c) of this title, any rule or order under subsection (c) of this section corresponding to a prohibition under subsection (b) of this section, shall be treated as a part of such plan. For purposes of section 7413 of this title, a prohibition under subsection (b) of this section, applicable to any source, and a corresponding rule or order under subsection (c) of this section, shall be treated as part of the applicable implementation plan for the State in which subject source is located.

Clean Air Act Amendments of 1977,
42 U.S.C. § 7425

Delegation of Presidential authority

(g) The President may delegate his authority under this section to an officer or employee of the United States designated by him on a case-by-case basis or in any other manner he deems suitable.

Locally or regionally available coal or coal derivatives

(h) For the purpose of this section the term "locally or regionally available coal or coal derivatives" means coal or coal derivatives which is, or can in the judgment of the State or the Administrator feasibly be, mined or produced in the local or regional area (as determined by the Administrator) in which the major fuel burning stationary source is located.

July 14, 1955, c. 360, Title I, § 125, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 122, 91 Stat. 722.

FILED
NOV 13 1980
MICHAEL RODAK, JR., CLE

No. 80-581

In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

-against-

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS OR AFFIRM

MIKE GREELY
Counsel of Record
Attorney General
State of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

MIKE McGRATH
Assistant Attorney General

MIKE McCARTER
Assistant Attorney General
Office of the Attorney General
State Capitol
Helena, Montana 59601
(406) 449-2026

ROSS CANNON
Cannon & Gillespie
2031 Eleventh Avenue
Helena, Montana 59601
(406) 442-9930

ATTORNEYS FOR APPELLEES

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

STATEMENT OF THE QUESTIONS PRESENTED

1. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax did not impose an unconstitutional burden on interstate commerce in light of the unbroken line of precedents in this and other courts sustaining such taxes over Commerce Clause challenges?

2. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax satisfied the Commerce Clause requirement that a tax be fairly related to services provided by the state in light of the fact that Montana has provided the taxpayers with "services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society [*Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434, 445 (1979)]?

3. Was the Montana Supreme Court correct in concluding that Montana's severance tax, which is "imposed on each ton of coal produced in the state," did not discriminate against interstate commerce?

4. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax was not preempted by federal legislation under the Supremacy Clause in light of the appellants' failure to identify any federal policy to limit state severance taxes on coal?

5. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax was not preempted under the Supremacy Clause by the Mineral Lands Leasing Act of 1920 in light of the specific provision in that statute declaring inviolate "the rights of the States . . . to exercise any rights which they may have, including the right to levy and collect taxes upon . . .output of mines . . . of any lessee of the United States?"

TABLE OF CONTENTS

Pages

Statement of the Case 1

The Proceedings Below 2

Statement of Facts 3

Introduction to Argument 5

Argument:

This appeal does not present substantial federal questions and should accordingly be dismissed. 6

I. The Montana Supreme Court's decision sustaining Montana's coal severance tax is fully supported by settled Commerce Clause principles and sound institutional considerations. 6

A. The decisions of this and other courts repudiating Commerce Clause challenges to state severance taxes reflect wise and established principles of Commerce Clause adjudication and should not be distinguished. 8

B. Assuming *arguendo* that this Court's severance tax cases are not dispositive, appellant's Commerce Clause claims still fail to raise a substantial federal question. 12

1. The Montana coal severance tax does not discriminate against interstate commerce and is not "tailored" to fall on residents of other states. 13

TABLE OF CONTENTS—Continued

Pages

2. Montana's coal severance tax is fairly related to benefits provided to appellants by the state. 14

C. Sound institutional considerations reinforce the conclusion that appellants' Commerce Clause claims should be dismissed. 16

II. The Montana Supreme Court's decision rejecting the claims that Montana's coal severance tax is preempted by federal legislation is fully justified in light of appellants' failure to identify any federal law or policy intended to limit the amount of state severance taxes on coal. 20

A. Montana's coal severance tax is not preempted by broad national policies allegedly favoring the use of coal. 21

B. Montana's coal severance tax is not preempted by the Mineral Lands Leasing Act of 1920 in light of the specific provision in the Act declaring inviolate the rights of the states to impose severance taxes. 24

Conclusion 25

TABLE OF AUTHORITIES

CASES:

Alaska v. Arctic Maid, 366 U. S. 199 (1961) 10

Bel Oil Corp. v. Roland, 242 La. 498, 137 So. 2d 308, appeal dismissed, 371 U. S. 2 (1962) 6

TABLE OF AUTHORITIES—Continued

Pages

City of Pittsburgh v. Alco Parking Corp., 417 U. S. 369 (1974) 18

Colonial Pipeline Co. v. Traigle, 421 U. S. 100, 109 (1975) 15

Conley v. Gibson, 355 U. S. 41 (1957) 5

Department of Revenue v. Association of Washington Stevedoring Cos., 435 U. S. 734 (1978) 15

Dunbar-Stanley Studios, Inc. v. Alabama, 393 U. S. 537, 541 (1969) 11

Exxon Corp. v. Wisconsin Department of Revenue, 100 S. Ct. 2109, 2122 (1980) 15, 23

Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1, 199 (1824) 23

Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922) 6, 7, 8, 9, 10, 12

Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927) 6

Japan Line, Ltd. v. County of Los Angeles, 441 U. S. 434, 445 (1979) ..... i, 15

Magnano Co. v. Hamilton, 292 U. S. 40 (1934) 18

Mid-Northern Oil Co. v. Montana, 268 U. S. 45, 50 (1925) 25

Minnesota v. Blasius, 290 U. S. 1, 8 (1933) 9

Mobil Oil Corp. v. Commissioner of Taxes, 100 S. Ct. 1223, 1237 (1980) 23

Moorman Manufacturing Co. v. Bair, 437 U. S. 267, 280 (1978) 20

TABLE OF AUTHORITIES—Continued

Pages

National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937) 8, 9

Nippert v. City of Richmond, 327 U. S. 416 (1940) 13

Oliver Iron Mining Co. v. Lord, 262 U. S. 172 (1923) 6

Philadelphia v. New Jersey, 437 U. S. 617, 622-23 (1978) 10

Post Oak Oil Co. v. State Tax Commission, 575 P. 2d 965 (Okla. 1978) 6

Western Livestock v. Bureau of Revenue, 303 U. S. 250, 254 (1938) 14

Wickard v. Filburn, 317 U. S. 111 (1942) 9, 10

STATUTE:

Section 15-35-103, MCA 3, 13

CONSTITUTION:

U. S. Const., Art. I, § 8, cl. 3 ..... 9, 19

No. 80-581

In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

-against-

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Montana on the ground that the cause does not present a substantial federal question.

STATEMENT OF THE CASE

"This case," as appellants observe, "presents issues as old as the Republic and as timely as tomorrow's headlines." (Appellants' Jurisdictional Statement 2, hereinafter cited as "J. S.") Indeed, stripped of the contempo-

rary emotionalism surrounding them, these issues are indistinguishable from those that this Court has resolved in the past precisely as the Montana Supreme Court resolved them in this case. The state court's decision rejecting appellants' attack on the constitutionality of Montana's coal severance tax is rooted in settled principles of Commerce Clause adjudication and preemption analysis. It reflects sound institutional considerations as well. There is nothing new in this case other than appellants' unprecedented efforts to persuade this Court to undertake the constitutionally unwarranted and judicially unmanageable task of establishing the appropriate rate of a state tax levied for the general support of government.

THE PROCEEDINGS BELOW

The appellants allege that because of its rate the Montana coal severance tax creates a burden on interstate commerce and frustrates federal energy policies regarding the use of coal. The State moved to dismiss appellant's complaints asserting that as a matter of law the tax does not burden interstate commerce nor does it frustrate any national energy policy. The district court granted the motion, the Montana Supreme Court affirmed and the appellants now seek review by this Court. The decision of the Supreme Court of the State of Montana, dated July 17, 1980, is reported at 615 P. 2d 847. It is reprinted in the Appendix to the Jurisdictional Statement, at pages 1a-40a.

STATEMENT OF FACTS

Montana imposes a severance tax on "each ton of coal produced in the state" based on the value and energy content of the coal and the method of extraction. Section 15-35-103, MCA. The tax applies equally to coal sold and consumed in Montana as well as coal destined for out of state. The effective rate of the tax is substantially less than the statutory thirty percent (30%) due to deductions allowed for other taxes paid on production. § 15-35-103, MCA.

Montana is not unique in imposing severance taxes. Severance taxes, which are excise taxes on the extraction of natural resources, are an important source of state revenue. The first such tax was imposed by the State of Michigan in 1846[1] and by 1979 thirty-three states had adopted some type of severance tax.[2] Severance taxes are levied on oil, gas, coal, copper, potash, uranium, molybdenum, vermiculite, sulfur, dolomite, sand, gravel, limestone, forest products, iron, taconite and even salt. In terms of total state revenues, severance taxes in 1979 represented 25.5% of total tax collections for Wyoming; 22% for Louisiana; 21.1% for Alaska; 18.5% for Oklahoma; 18% for Texas; and 13.5% for Montana.[3]

---

1 United States Department of Agriculture: State Taxation of Mineral Deposits and Production (1978).

2 U. S. Department of Commerce: Bureau of Census State Government Tax Collections in 1979 (1980), Table 3.

3 See U. S. Department of Commerce: Bureau of Census, State Government Tax Collections in 1979 (1980), Table 3. Collections by the top ten states for 1979 were as follows:

(Continued on next page)

When viewed as a tax on energy, Montana's coal tax compares favorably with the tax rates imposed on oil and gas by Texas, Louisiana, Oklahoma and New Mexico. In a recent study undertaken by the Texas Comptroller of Public Accounts, the Texas severance tax amounted to 6.36 cents per million BTUs of oil and gas in fiscal 1977. The rates per million BTUs in Louisiana, Oklahoma and New Mexico were 10.26, 8.13 and 7.76 cents respectively. Montana's rate per million BTUs of coal was approximately 7.11 cents.

The appellants continue to assert that the coal taxed by Montana is federal coal, and thus belongs to the people of the United States as a whole. What they ignore is that through leases the federal government has sold its interest in the coal and the people of the United States, through royalties, will receive their fair rate of return. As noted by the Montana Court:

> The coal being taxed here . . . is not "our" coal, but the personal property of the plaintiffs who produced it under lease or permit. When the coal is mined, the federal government is in no different position as a lessor than a private lessor who grants a mining lease or permit. (J. S. 27a.)

Finally, we do not concede as true the factual statements made in the Jurisdictional Statement. Rather, ap-

---

(Continued from previous page)

1.	Texas	$1,025,550,000
2.	Louisiana	$ 511,589,000
3.	Oklahoma	$ 280,982,000
4.	Alaska	$ 173,685,000
5.	New Mexico	$ 159,431,000
6.	Kentucky	$ 154,017,000
7.	Florida	$ 91,901,000
8.	Wyoming	$ 87,419,000
9.	Minnesota	$ 71,263,000
10.	Montana	$ 53,919,000

pellees adopt the position that the appellants can prove no set of facts in support of their claim that entitles them to relief. *See Conley v. Gibson,* 355 U. S. 41 (1957).

———o———

INTRODUCTION TO ARGUMENT

The power of states to tax is, of course, not unlimited. However, the appellants' attack upon Montana's severance tax does not fall within any heretofore recognized constitutional limits on state powers. Rather, it strikes at the very heart of the federalist system.

Since the appellants have conceded that some level of Montana's severance tax is permissible, they are asking this Court to determine the rate. If thirty percent is too high, will this Court find a 28 percent rate, a twenty-five percent rate, or a fifteen percent rate to be acceptable? What appellants propose under the guise of the Commerce and Supremacy Clauses is that the courts determine state tax rates utilizing hypothetical economic models, theories and projections, all based on unquantifiable assumptions. If appellants' contentions are adopted, no state tax will be safe.

The economies and resources of the states are diverse, and each state has adopted a system of taxation suitable to its own needs and resources. States rich in mineral deposits utilize mineral severance taxes; states with significant industry may levy manufacturing taxes or adopt significant corporate franchise or income taxes. New York derives significant revenues from its stock and document

transfer taxes,[4] and states with significant tourism utilize sales, motel and other consumption type taxes which may fall heavily on tourists.[5] All of these taxes may be passed on to nonresidents. Undertaking the examination of state taxes which appellants propose would create chaos in state financial planning and present the court system with an impossible task—legislating state tax rates.

ARGUMENT

This appeal does not present substantial federal questions and should accordingly be dismissed.

I. The Montana Supreme Court's decision sustaining Montana's coal severance tax is fully supported by settled Commerce Clause principles and sound institutional considerations.

The decision of the Montana Supreme Court is the most recent of an unbroken line of precedents in this and other courts rejecting Commerce Clause attacks on state severance taxes. *See, e. g., Heisler v. Thomas Colliery Co.*, 260 U. S. 245 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923); *Hope Natural Gas Co. v. Hall*, 274 U. S. 284 (1927); *Bel Oil Corp. v. Roland*, 242 La. 498, 137 So. 2d 308, *appeal dismissed*, 371 U. S. 2 (1962); *Post Oak Oil Co. v. State Tax Commission*, 575 P. 2d 965 (Okla.

4 In 1979 the states collected almost a billion dollars in document and stock transfer taxes. Of this, New York and Florida accounted for two-thirds. New York's collections alone amounted to 430 million dollars.

5 See Charles E. McClure, Jr., *The Interstate Exporting of State and Local Taxes:* Estimates of 1962, 20 National Tax Journal 49, 64 (1967).

1978). Indeed, the taxpayers' allegations that were dismissed in these cases are indistinguishable from those asserted by appellants here. For example, in the seminal case of *Heisler v. Thomas Colliery Co., supra,* the taxpayers contended, just as appellants contend here, that a severance tax upon coal destined for shipment to other states burdened interstate commerce. In support of this contention it was argued, just as appellants argue here, that:

> Pennsylvania has a natural monopoly of anthracite coal in this country. That coal is a prime necessity of life, especially in the northeastern States. Eighty percent of such coal is shipped out of Pennsylvania . . . [and the] intention at the time this act was passed was so to use the natural monopoly which Pennsylvania possesses as to compel the inhabitants of other States to pay a tax to Pennsylvania. . . . [260 U. S. at 251-52.]

Despite these allegations and predictions of dire consequences to the nation if the tax should be sustained, this Court concluded that Pennsylvania's tax on the local activity of severing natural resources from the earth did not constitute a burden on interstate commerce within the meaning of the Commerce Clause.

There is nothing about the instant controversy that would remove it from the rule of *Heisler* and its progeny, and the appellants make no effort to distinguish the present case from those that have uniformly rejected claims identical to theirs. Instead, recognizing that their Commerce Clause allegations are foreclosed by this Court's severance tax decisions, the appellants are compelled to attack the authority of the decisions themselves in their efforts to avoid summary dismissal of their claims. They

suggest that the Court's severance tax decisions no longer reflect "the law" (J. S. 16) and that the law reflected in the Court's contemporary Commerce Clause opinions cannot be reconciled with the results of the earlier cases. In its carefully reasoned opinion, the Montana Supreme Court rejected both of these contentions, even going so far as to rule on appellants' claims on the assumption that this Court's severance tax decisions were not dispositive. (J. S. 19a-27a.) Hence, as the opinion below demonstrates, appellants' claims are insubstantial on any view of the force of these precedents. Moreover, in light of the essential nature of appellants' contention in this case—which is simply that the rate of the tax is too high—the correctness of the result reached by the Montana Supreme Court cannot be questioned.

A. The decisions of this and other courts repudiating Commerce Clause challenges to state severance taxes reflect wise and established principles of Commerce Clause adjudication and should not be distinguished.

The settled rule that state severance taxes raise no substantial Commerce Clause issue was right when it was first articulated in *Heisler v. Thomas Colliery Co., supra,* and it is right today. The principle underlying the doctrine is simple: Not every state tax that allegedly affects interstate commerce burdens it within the meaning of the Commerce Clause. Under this principle, state severance taxes have never been viewed as imposing a burden on interstate commerce.

Appellants seek to discredit this principle by involving precedents dealing with the scope of congressional power under the Commerce Clause. *See, e. g., Na-*

tional Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1 (1937); *Wickard v. Filburn*, 317 U. S. 111 (1942). They contend that congressional authority to regulate an activity under the Commerce Clause's affirmative grant of power to Congress "to regulate Commerce . . . among the several States," U. S. Const., Art. I, § 8, cl. 3, carries with it the implication that a state tax on such activity imposes a burden on interstate commerce under the negative implications of the Clause. (J. S. 16-18.) The argument is based on the false premise that the Commerce Clause considerations bearing on the scope of congressional power are identical to those bearing on the limitations on state power.

This Court has consistently recognized the substantial differences between these two questions. *See, e. g., Minnesota v. Blasius*, 290 U. S. 1, 8 (1933). Indeed, while appellants cite *Wickard v. Filburn, supra,* for the proposition that the Commerce Clause's negative restraints have been broadened by decisions expansively construing the scope of congressional power (J. S. 17), the Court in *Wickard* made exactly the opposite point. The scope of congressional authority depended on an inquiry into "what was 'necessary and proper' to the exercise by Congress of its granted power," 317 U. S. at 121, whereas the point of reference for limitations on state authority was the "concept of sovereignty . . . implicit in the status of statehood." *Id.* Hence in determining whether Congress had the authority under the Commerce Clause to regulate activities affecting interstate commerce, the Court in *Wickard* was not confined by the holdings in such cases as *Heisler* that state taxes concerning such activity imposed no burden on interstate commerce. This was not because these cases

"no longer accurately reflected the law," as appellants suggest. (J. S. 17.) It was rather because the considerations underlying the scope of federal powers that Congress may exercise under the Commerce Clause are different from those bearing on the Clause when it functions as a negative restraint on state powers. Thus, to take the facts of *Wickard* itself, it can hardly be contended that the existence of congressional power to regulate the production of wheat grown for "home" consumption warrants the inference that a state tax upon such consumption imposes a burden on interstate commerce. Nor does the fact that there may be a single definition of interstate commerce for Commerce Clause purposes, *see, e. g., Philadelphia v. New Jersey,* 437 U. S. 617, 622-23 (1978), advance appellants' cause here. Whatever may be the definition of interstate commerce, the Court has made it clear that:

> statements . . . made in upholding the rights of States to tax what was argued to be interstate commerce . . . are not used interchangeably as statements of law where the issue is the power of Congress to regulate under the Commerce Clause. The restrictions imposed by the Commerce Clause standing alone may well be less than the pre-emptive reach of statutes passed by Congress pursuant to the power. [*Douglas v. Seacoast Products, Inc.,* 431 U. S. 265, 282 n. 17 (1977).]

The Court itself has given every indication that the holdings of cases like *Heisler* have lost none of their controlling force. In *Alaska v. Arctic Maid,* 366 U. S. 199 (1961), the Court, in holding that a license tax on the business of commercial fishing did not constitute a burden on interstate commerce, declared:

> The process of gathering fish either through the catcher boats that are part of respondents' fleet or through independent operators is a "local activity" (*Michigan-Wisconsin Pipe Line Co. v. Calvert, supra*) [347 U. S. 157] 166 (1954) in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer v. Witsell, supra*) [334 U. S. 385 (1948)] and the extraction of ore (*Oliver Iron Mining Co. v. Lord,* 262 U. S. 172) are not dispositive of this controversy. The *Oliver Iron* case is indeed a first cousin of the present case. Here, as there, the tax is an occupation tax. Here, as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the State can constitutionally reach. Catching the fish or obtaining them in other ways from the local market is but an extension of the freezer ship's operations within Alaska's waters. [366 U. S. at 203-04.]

In *Dunbar-Stanley Studios, Inc. v. Alabama,* 393 U. S. 537, 541 (1969), the Court similarly observed:

> The extraction of a natural resource within a State is not immunized from state taxation merely because, once extracted, the product will immediately be shipped out of the state for processing and sale to consumers. *Alaska v. Arctic Maid,* supra, at 203-04; *Oliver Iron Mining Co. v. Lord,* 262 U. S. 172, 177-79 (1923).

In short, the Court's severance tax cases stand for the proposition that a state tax imposed on the extraction of natural resources within the state does not burden interstate commerce. This Court's contemporary Commerce Clause opinions plainly indicate that these cases continue to support that proposition. For these reasons, the appel-

lants' claim that Montana's coal severance tax violates the Commerce Clause fails to raise a substantial federal question and should accordingly be dismissed.

B. Assuming arguendo that this Court's severance tax cases are not dispositive, appellant's Commerce Clause claims still fail to raise a substantial federal question.

While the Court below properly concluded that *Heisler* and cases like it were dispositive of appellants' Commerce Clause claims, it nevertheless went on to consider these claims on the assumption that the severance tax cases were not controlling. (J. S. 19a-27a.) On this assumption, the validity of Montana's coal severance tax under the Commerce Clause depended on whether it

> is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. [*Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274, 279 (1977).]

Applying these standards, the Court held that appellants' Commerce Clause claims were without merit. Specifically, the Court rejected appellants' claims that Montana's coal severance tax discriminated against interstate commerce and was not fairly related to services provided by the state. Appellants conceded below that the tax satisfied the Court's nexus and apportionment criteria. Brief of Plaintiffs-Appellants 52. The state court's determination is amply supported by established principles of Commerce Clause adjudication and provides an independent

basis for summarily dismissing appellants' Commerce Clause claims.

1. The Montana coal severance tax does not discriminate against interstate commerce and is not "tailored" to fall on residents of other states.

Montana's coal severance tax is "imposed on each ton of coal produced in the state." Section 15-35-103, MCA. The levy is nondiscriminatory on its face: it applies to all coal extracted in the state; it applies without regard to the ultimate destination of the coal—whether inside or outside the state; and it applies without regard to the nature of the enterprise extracting the coal—whether local or interstate. No claim can plausibly be made that the coal severance tax explicitly discriminates against interstate commerce.

It is true, of course, that the Commerce Clause's proscription against discriminatory taxes is not limited to taxes that discriminate on their face against interstate commerce. The Clause also forbids taxes which, though nondiscriminatory on their face, by their practical operation discriminate against interstate commerce. *See, e. g., Nippert v. City of Richmond,* 327 U. S. 416 (1940). Montana's coal severance tax cannot reasonably be characterized as such a levy, however. To the extent that either local or interstate business shoulders the burden of the tax, such burden is borne according to the amount or value of the coal extracted and not according to any distinction—in principle or in practice—between local and interstate commerce. Moreover, if appellants' claim of discrimination is predicated on the fact that the coal in question is transported out-of-state so that the tax burden

allegedly falls on out-of-state consumers, it likewise fails to state a claim under the Commerce Clause. The states do not discriminate against interstate commerce—nor do they improperly "tailor" their tax to fall on residents of other states—when they demand from those consuming local resources payment for a share of the costs imposed on and the benefits provided by the state with respect to the extraction of these resources. Interstate commerce, the court has frequently reiterated, must pay its way. *See, e. g., Western Livestock v. Bureau of Revenue,* 303 U. S. 250, 254 (1938). Finally, to the extent that appellants' discrimination and "tailored tax" claims are rooted in their allegation that interstate commerce is being made to pay *more* than its way, such claims in substance raise their independent contention that the coal severance tax is not fairly related to benefits provided by the state. (J. S. 20.) Because this contention is without merit (see pp. 17-19 *infra*), any claims based upon it must likewise be dismissed.

2. Montana's coal severance tax is fairly related to benefits provided to appellants by the state.

The state court's determination that Montana's coal severance tax is fairly related to benefits provided by the state is unassailable in light of this Court's precedents applying that test. Montana has provided the appellants with the benefits of fire and police protection. It has provided them with benefits of an educated work force. It has provided them with the benefits of roads and waterways. It has provided them with the benefits of an organized government and an orderly system of laws. In short, Montana has provided the appellants with the benefits of a civilized society—the economic infrastructure and

social machinery that are essential preconditions to the conduct of modern economic activity—including the appellants' operations. Moreover, Montana has provided the taxpayers with the extraordinary benefits they derive from extracting a valuable, nonrenewable resource from the earth of Montana.

These benefits are of incalculable value and plainly satisfy the Commerce Clause requirement that a tax be fairly related to benefits provided by the state. The Court's recent observation concerning the application of this test to a California levy is dispositive here:

> The tax . . . is "fairly related to the services provided by" California, services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society. [*Japan Line, Ltd. v. County of Los Angeles,* 441 U. S. 434, 445 (1979).]

See also Exxon Corp. v. Wisconsin Department of Revenue, 100 S. Ct. 2109, 2122 (1980). While appellants suggest that the "fair relation" test is one that requires a detailed factual inquiry into the value of the governmental benefits provided to the taxpayer (J. S. 20), this Court's precedents make it clear that no such undertaking is contemplated. *See, e. g., Japan Line, Ltd. v. County of Los Angeles, supra; Colonial Pipeline Co. v. Traigle,* 421 U. S. 100, 109 (1975). To be sure, the Court did remark in *Department of Revenue v. Association of Washington Stevedoring Cos.,* 435 U. S. 734 (1978), that "[n]othing in the record suggests that the tax is not fairly related to services provided by the State." *Id.* at 750-51. As Justice Powell pointed out in his concurring opinion, however, "this statement *cannot* be questioned" since the tax-

payers "undoubtedly avail themselves of police and fire protection, as well as other benefits [the state] offers its local businesses." *Id.* at 764 (emphasis supplied). Since appellants undoubtedly avail themselves of fire and police protection as well as the benefits of a trained work force and the civilized society that Montana offers its local businesses, it cannot be questioned that the coal severance tax is fairly related to benefits provided by the state.

* * *

In sum, the Montana Supreme Court's rejection of appellants' contentions that the coal severance tax discriminates against interstate commerce and is not fairly related to benefits provided by the state reflects a proper application of settled Commerce Clause principles and independently supports the conclusion that appellants' Commerce Clause claims fail to raise a substantial federal question.

C. Sound institutional considerations reinforce the conclusion that appellants' Commerce Clause claims should be dismissed.

While established constitutional doctrine requires the summary dismissal of appellants' Commerce Clause claims, there are additional factors, perhaps the most significant, that strongly support the legal principles delineated above. Fundamental considerations regarding the appropriate role of the courts in adjudicating state tax controversies reinforce—if they do not independently compel—the conclusion that appellants' Commerce Clause claims must be dismissed.

The heart of appellants' case is simply that the rate of Montana's coal severance tax is too high (J. S. i.) They

explicitly concede that Montana may impose a coal severance tax on their activities (J. S. 15). Presumably appellants would not be heard to complain about a severance tax of one, two, or three percent of the contract sales price of the coal. Such a tax would undoubtedly be viewed by appellants as demanding from them no more than their "fair share" of the costs they impose and the benefits they derive from the state and would not be regarded as discriminatory. When, however, the rate is not three but 30 percent, the appellants vigorously attack the levy as discriminatory and unfairly related to benefits provided by the state. Plainly, then, it is the rate of the coal severance tax—and only the rate—that is at issue in this case.

In view of this fact, it is apparent that the appellants are asking this Court to do what no court has ever done, namely, to determine the appropriate rate of a general excise tax. This is the inescapable conclusion that emerges from the appellants' assertion, on the one hand, that a tax of 30 percent is too high and their concession, on the other, that a tax at some lower rate would be valid. By their reasoning, there must be some rate at which the tax would pass constitutional muster, and it is evidently the task of the courts to ascertain that rate. Thus, if a tax of 30 percent is unconstitutional, suppose the legislature reenacts that tax at a rate of 25, 20, or 15 percent? Indeed, even if a tax of 30 percent is unconstitutional for one tax period, what about subsequent tax periods when the costs imposed on or the benefits provided by the state may have increased? If the judicial standard is whether the tax is fairly related to such costs and benefits, why should a rate that is held to be too high in one year be too high for a future year in which costs or benefits may

have increased due to unanticipated environmental damage or higher governmental expenditures? Does this mean that the constitutionality of the rate of the coal severance tax is to be subjected to an annual judicial review, based on a detailed inquiry into these questions? And beyond these questions, how will courts quantify benefits which the state furnishes its taxpayers? Particularly, how will it quantify the benefits of an organized society; the loss of aesthetic values; unpredictable damage to the environment; general social costs of increased crime, alcoholism and divorce in communities experiencing rapid resource development; the ultimate loss of a non-renewable resource; and the future costs of economic and social dislocation which result when a resource is mined out? How will courts take into account the fact that a tax may fall on nonresidents because of monopolistic or oligopolistic market power of the taxpayer or because of the regulatory schemes of consuming states?

The answer, obviously, is that courts are institutionally incapable of making such determinations, and they have never been charged with the responsibility of doing so. Whenever taxpayers have invited this Court to strike down a general excise tax simply on the ground that it was excessive, this Court has steadfastly refused to do so. *See, e. g., City of Pittsburgh v. Alco Parking Corp.*, 417 U. S. 369 (1974) and cases cited therein; *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934). This no doubt explains why this Court has consistently held that a tax satisfies the requirement that it be fairly related to benefits provided by the state so long as the state has provided the taxpayer with the benefits of a civilized society. See pp. 17-19, *supra*.

This is not to suggest, however, that taxpayers who feel aggrieved by the rate of a state tax affecting interstate commerce have no avenue for relief. While a court is an inappropriate forum for determining the rate of a tax, a legislative body is fully capable of making such a determination. As pointed out by the court below, the appellant coal companies "are a vigorous presence at any session of the Montana Legislature." (J. S. 26a.) And, in the context of the present controversy, it is the United States Congress that is charged with the explicit grant of power "to regulate Commerce . . . among the Several States." U. S. Const., Art. I, § 8, cl. 3. In fact, Congress is presently focusing abundant attention on national energy policy in general and on the very issues that divide the parties here. Legislation has been introduced in Congress directed specifically at the problem that appellants seek to have this Court resolve. See S. 2694, H. R. 6625, H. R. 6654, and H. R. 7163, 96th Cong., 2d Sess. (1980) (imposing 12½% rate limitation on state severance taxes on coal destined for interstate shipment). Hearings have been held on this proposed legislation. *Coal Severance Taxes: Hearings before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce,* 96th Cong., 2d Sess. (1980).[6] The legislation has been approved by the House Subcommittee on Energy and Power. Report Bulletin No. 12, Prentice Hall State and Local Taxes (All States Unit) (Sept. 16, 1980). It is therefore plain that Congress is fully aware of and in-

---

6 Hearings were also held on S. 2695 by the Senate Committee on Energy and Natural Resources, *State Tax Review,* Vol. 41, No. 37 (Sept. 9, 1980), but the hearings have not yet been printed.

volved in the conflict that only the legislative branch is capable of resolving. Armed with the extensive information provided by its hearings and by skilled congressional staffs, Congress can make an informed judgment as to whether such a limitation on state tax power is warranted. As this Court has frequently recognized, the resolution of such issues has been committed by the Constitution to the legislative branch. *See, e. g., Moorman Manufacturing Co. v. Bair,* 437 U. S. 267, 280 (1978).

For all of these reasons, institutional considerations plainly counsel judicial restraint in this controversy and reinforce the conclusion that appellants' Commerce Clause claims should be dismissed.

II. The Montana Supreme Court's decision rejecting the claims that Montana's coal severance tax is preempted by federal legislation is fully justified in light of appellants' failure to identify any federal law or policy intended to limit the amount of state severance taxes on coal.

The gravamen of appellants' preemption claims, like the substance of their Commerce Clause claims, is that Montana's coal severance tax is too high. Appellants venture no suggestion that Congress has expressly or impliedly occupied the field of coal regulation so as to preclude state severance taxes. Nor do they contend that coal severance taxes generally "frustrate" congressional objectives so as to require their invalidation under the Supremacy Clause. Rather, conceding that no federal law or policy prevents Montana from levying a coal severance tax, appellants assert that Montana's coal severance tax is preempted solely on the ground that "the tax is exces-

sive in amount." (J. S. i); *see also id.* at 15, 25-26; Brief of Plaintiffs-Appellants 46-47; 52 n. 29; 79. Because one cannot reasonably conclude from the federal legislation cited by appellants that there is any congressional purpose or policy to limit the amount of coal severance taxes, the Montana Supreme Court was entirely justified in dismissing appellants' preemption claims.

A. Montana's coal severance tax is not preempted by broad national policies allegedly favoring the use of coal.

Citing numerous federal statutes that allegedly "reflect" a general national policy to encourage the use of coal (J. S. 1-2 n. 1, 22-23) appellants assert that the amount of Montana's coal severance tax frustrates such policy and that the levy is therefore preempted. The essence of their claim is that the indirect economic impact of a state tax upon activities that are encouraged by federal legislation requires the invalidation of the state tax under the Supremacy Clause. Because such a contention inaccurately characterizes the federal policies involved, is wholly at odds with settled principles of preemption analysis, and ignores this Court's frequent recognition of state tax power as essential to the states' independent existence, the court below was clearly correct in rejecting it.

First, appellants' claim is based on the false premise that the statutes in question establish a monolithic federal policy regarding coal in general and the containment of taxes and other costs associated with coal production in particular. As the court below observed:

> [W]e do not find a national domestic energy policy or congressional enactments predicated upon a Mon-

> tana coal severance tax of fifteen percent or less. Indeed, the federal enactments point in other directions. There are incentives for the development of underground coal mines. 42 U. S. C. § 6211. There is a provision for export restrictions. 42 U. S. C. § 6212. Miners of low sulfur coal are not exempted from costly environmental strip mining regulations. 30 U. S. C. § 1251, et seq. Health and safety requirements are enforced upon strip coal miners. 30 U. S. C. § 801, et seq. Royalties on federal lands are payable under the Mineral Lands Leasing Act of 1920 as amended. 30 U. S. C. § 181, et seq. Congress seems to prefer underground coal mining. 30 U. S. C. § 1201, et seq. As the District Court found, to the distaste of the plaintiffs, Congress favors and encourages the production and use of high sulfur eastern and midwestern coal, rather than low sulfur western coal, the latter of which is to be used principally by existing facilities for which technological upgrading of air pollution control equipment is impractical or not feasible. 42 U. S. C. §§ 7411 and 7425. Indeed, § 7411, as amended in 1977, requires users of low sulfur coal nevertheless to install the "best technological system of continuous emission reduction" required for all stationary sources, even though such systems may be unnecessary because the low-sulfur coal meets the emission standards. *See*, U. S. Code Congressional and Administrative News, 95th Congress, 1977 Session, Vol. II, at 1245. Congress would rather that eastern and midwestern plants used "local coal," even coal with higher sulfur content than western low-sulfur coal. [J. S. 33a-34a.]

Second, even assuming a broad national policy to encourage the use of low sulfur coal like Montana's, it is a fundamental precept of preemption doctrine that a general policy of this nature cannot alone be the predicate for invalidating state legislation. As this Court recently declared:

> Appellants point out . . . the . . . basic national policy favoring free competition, and argue that the [state]

> statute "undermin[es]" the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts. This is merely another way of stating that the [state] statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." *Northern Pacific R. Co. v. United States,* 356 U. S. 1, 4. Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the [state] statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to pre-empt the power of the [state] Legislature to enact this law. [*Exxon Corp. v. Governor of Maryland,* 437 U. S. 117, 133-34 (1978) (footnotes omitted).]

By the same reasoning, if the increased costs that a state tax imposes upon some activity that is favored by federal policy were enough to render the tax invalid, the states' power of taxation would be effectively destroyed.

Third, the ill-considered nature of appellants' claim is underscored by the fact that it is a state tax that is purportedly preempted by vague national policies. From the very beginning the Court has recognized that the states' "power of taxation is indispensable to their existence." *Gibbons v. Ogden,* 22 U. S. (9 Wheat.) 1, 199 (1824). Moreover, the exercise of state tax power has traditionally been regarded as compatible with the exercise of federal power. *Id.; see also Mobil Oil Corp. v. Commissioner of Taxes,* 100 S. Ct. 1223, 1237 (1980). The suggestion that the amount of a state tax may be limited merely because the

tax imposes increased costs on congressionally, encouraged activity flies in the face of these considerations.

Finally, it is noteworthy that Congress is presently considering legislation that would accomplish precisely what appellants seek to achieve by judicial fiat. As pointed out above (see pp. 22-23 *supra*), legislation has been introduced in Congress that would impose a 12½% rate ceiling on coal severance taxes. See S. 2695, H. R. 7725, H. R. 6654, and H. R. 7163, 96th Cong., 2d Sess. (1980).[7] Under these circumstances, it would be especially inappropriate for this Court to entertain appellants' preemption claim.

B. Montana's coal severance tax is not preempted by the Mineral Lands Leasing Act of 1920 in light of the specific provision in the Act declaring inviolate the rights of the states to impose severance taxes.

Beyond their preemption claim predicated on broad national policies to encourage the use of coal, appellants claim that the amount of Montana's coal severance tax is limited by policies underlying the Mineral Lands Leasing Act of 1920. 41 Stat. 437. As the court below properly concluded, the appellants' claim of frustration of federal policy is foreclosed by the explicit terms of the statute itself. The Act provides that

> Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority

---

7 The legislation is tendered as an amendment to the Powerplant and Industrial Fuel Use Act of 1978, 42 U. S. C. § 8301 *et seq.*, legislation that appellants cite as already having established a limitation on coal severance taxes. J. S. 1-2 n.1; 22.

> to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. [30 U. S. C. § 189.]

In *Mid-Northern Oil Co. v. Montana,* 268 U. S. 45, 50 (1925), this Court observed:

> No doubt what Congress immediately had in mind was the necessity of making it clear, notwithstanding the interest of the government in the leased lands, the right of the states to tax improvements thereon and the output thereof should not be in doubt; but the intention likewise to save the authority of the states in respect of all other taxable things is made evident by the addition of the three general categories, "other rights, property or assets." We think the proviso plainly discloses the intention of Congress that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful.
>
> * * *

For the foregoing reasons, appellants' claims that Montana's coal severance tax is preempted by federal legislation do not present a substantial federal question and should accordingly be dismissed.

CONCLUSION

Wherefore, appellees respectfully submit that the questions presented by the Jurisdictional Statement are not substantial federal questions. Appellees respectfully move the Court to dismiss this appeal, or, in the alterna-

tive, to affirm the judgment entered in the cause by the Supreme Court of the State of Montana.

Respectfully submitted,

MIKE GREELY
Attorney General
Counsel of Record

State of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

MIKE McGRATH
Assistant Attorney General

MIKE McCARTER
Assistant Attorney General

Office of the Attorney General
State of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

ROSS CANNON
Cannon & Gillespie
2031 Eleventh Avenue
Helena, Montana 59601
(406) 442-9930

ATTORNEYS FOR APPELLEES

No. 80-581

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,
Appellants,

—against—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

WILLIAM J. CARI
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant Westmoreland Resources, Inc.

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants except Western Energy Company

, November, 1980

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE QUESTIONS PRESENTED ARE SUBSTANTIAL	1
II. SEVEN STATES HAVE ALREADY URGED REVERSAL	2
III. THE CASE IS APPROPRIATE FOR JUDICIAL ACTION	2
IV. APPELLEES HAVE SIMPLY SIDESTEPPED APPELLANTS' CENTRAL ARGUMENT	4
V. THE "FAIRLY RELATED" TEST RAISES ISSUES OF FACT	4
VI. THE MONTANA TAX CONTRAVENES THE SUPREMACY CLAUSE	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	PAGE
Austin v. *New Hampshire*, 420 U.S. 656 (1975) ...	6
Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 (1950) ...	3
City of Pittsburgh v. *Alco Parking Corp.*, 417 U.S. 369 (1974) ...	5, 6
Clark v. *Paul Gray, Inc.*, 306 U.S. 583 (1939) ...	3
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) ...	3, 6
Dixie Ohio Co. v. *Revenue Comm'n*, 306 U.S. 72 (1939) ...	3
Evansville Airport v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972) ...	3
Ingels v. *Morf*, 300 U.S. 290 (1937) ...	3
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 435 (1979) ...	5
Labor Board v. *Jones & Laughlin*, 301 U.S. 1 (1937) ...	4
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) ...	6
Mid-Northern Oil Co. v. *Montana*, 268 U.S. 45 (1925) ...	8
Washington Rev. Dep't v. *Stevedoring Ass'n*, 435 U.S. 734 (1978) ...	5
Wickard v. *Filburn*, 317 U.S. 111 (1942) ...	4

PAGE

Statutes and Other Authorities

Department of Energy, *Energy Supply and Demand in the Midterm: 1985, 1990 and 1995* at 106 (April 1979) 7

Environmental Protection Agency, *EPA Tables Relating to New Standards for New Coal-Fired Power Plants* at Table 4 (May 25, 1979) 7

H.R. Rep. No. 294, 95th Congress, 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Admin. News 1077-1577 at 1245 7

Mineral Lands Leasing Act of 1920, 30 U.S.C. § 189 8

United States Senate, Committee on Energy and Natural Resources, *Transcript of Proceedings—S.2695, To Amend the Powerplant and Industrial Fuel Use Act of 1978 to Further the Objectives of National Energy Policy of Conserving Oil and Natural Gas Through Removing Excessive Burdens on Production of Coal* (August 6, 1980) ... 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-581

COMMONWEALTH EDISON COMPANY, *et al.*,
Appellants,

—against—

STATE OF MONTANA, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

Appellants submit this brief in opposition to appellees' Motion to Dismiss or Affirm.

ARGUMENT

I.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case clearly raises substantial federal questions which have not been addressed squarely by this Court in modern times under modern Commerce Clause tests. Appellees concede that the "power of states to tax is, of course, not unlimited." (Motion to Dismiss or Affirm at 5) ("Motion"). They nowhere discuss how those limits are to be imposed. Their actual position here—that no such limits can be found in the Constitution—raises questions

which are timely, fundamental, and lie at the heart of the federal system. Appellees would strip these questions of their "contemporary emotionalism" in order to diminish their importance (Motion at 1-2), but that cannot be done readily or safely, for the questions arise in a context of vital national importance and require answers which necessarily have far reaching economic and practical impacts as this Nation attempts to take those sometimes painful steps necessary to resolve the energy crisis.

II.

SEVEN STATES HAVE ALREADY URGED REVERSAL

The answer given to these questions by the courts of appellees' home state—that its power to tax this resource has no constitutional limits—is deeply divisive. No less than seven states—Iowa, Kansas, Michigan, Minnesota, New Jersey, Texas and Wisconsin—have already filed *amicus* briefs urging reversal. Appellants' counsel have been advised that several other states intend to appear as *amici* urging reversal, if this Court notes probable jurisdiction.

III.

THE CASE IS APPROPRIATE FOR JUDICIAL ACTION

Appellees argue that the questions presented here should be left to Congress. But in testimony before the United States Senate just a few months ago, Governor Judge of Montana took the contrary view, saying:

> The reasonableness of the [Montana Coal Severance] tax will be decided probably in the Supreme Court.

* * * * *

> There you will decide on the reasonableness or the burden on interstate commerce and *that is a question most properly left to the court* and not determined by a committee of the United States Senate.[1]

In any event, this Court has made it clear that courts have the duty, in appropriate circumstances, to determine whether state taxes meet constitutional standards and, among other things, whether they are "fairly related to benefits provided the taxpayer." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). This does not require the courts to set an appropriate rate of tax but it does require the courts to use constitutional yardsticks, established by this Court, to determine whether a rate adopted by a legislature meets such standards. That is precisely the sort of decision courts are frequently called upon to make. *See, e.g., Evansville Airport* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 598-600 (1939); *Dixie Ohio Co.* v. *Revenue Comm'n*, 306 U.S. 72, 77-78 (1939); *Ingels* v. *Morf*, 300 U.S. 290, 296-97 (1937). *See also Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 548 (1950).

---

1 Testimony of Hon. Thomas Judge, Governor of Montana, before the United States Senate, Committee on Energy and Natural Resources, *Transcript of Proceedings — S. 2695, To Amend the Powerplant and Industrial Fuel Use Act of 1978 to Further the Objectives of National Energy Policy of Conserving Oil and Natural Gas Through Removing Excessive Burdens on Production of Coal* at 143 (August 6, 1980) ("Hearings"). (Emphasis supplied).

Governor Herschler of Wyoming similarly testified as follows:

> If we are concerned about the consumer, then I think *whether or not a severance tax is a burden on interstate commerce should be determined by the United States Supreme Court and not by legislation in Congress.* We're willing to take that risk, Mr. Chairman, with our court system.

Hearings at 125-26. (Emphasis supplied).

IV.

APPELLEES HAVE SIMPLY SIDE-STEPPED APPELLANTS' CENTRAL ARGUMENT

Appellees altogether fail to meet the argument that there have been manifest, unmistakable changes in Commerce Clause doctrines since 1937. Cases such as *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1 (1937), and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), represent a repudiation of the outmoded doctrines of *Heisler* and *Carter Coal*, that an activity has to be "in" interstate commerce before it may be reached by the Commerce Clause. Now, if as here an activity substantially affects commerce it is within the reach of the Commerce Clause.

V.

THE "FAIRLY RELATED" TEST RAISES ISSUES OF FACT

Appellees are driven to argue that Montana's Coal Severance Tax is "fairly related to benefits provided [to appellants] by the State" because Montana provides fire and police protection, an orderly system of laws and other benefits universally afforded by each of the fifty states. (Motion at 14). But if this meets the "fairly related" test repeatedly announced by this Court in recent years in Commerce Clause cases involving state taxes, the test has no real meaning, because it can be met by any state and under any circumstance.

If the "fair relation" test has any meaning at all, it requires a factual determination to be made in appropriate cases. If the test is ever to find application, this is the case. The Montana tax was enacted by a legislature which made no effort to balance costs and benefits; it has

resulted in a tax manifestly unrelated to any services provided. Fifty percent (50%) of the tax revenues are presently cached away in a trust fund for future generations.

As we have previously noted (Jurisdictional Statement at 20), cases in this Court clearly suggest that the test is factual and depends on the record. *See, e.g., Washington Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 750-51 (1978).[2] *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), is not to the contrary. In the first place, the language on which appellees particularly rely (Motion at 15) appears to be merely a restatement of one of the arguments advanced by appellees, not a holding of the Court. Moreover, to the extent that the Court indicated that the argument was "not without force," it did so simply as an assumption for purposes of argument, in a case in which the tax was invalidated on other grounds, and on the basis of a factual record which apparently did not disclose a gross disparity between the revenues derived from the tax and the cost of services provided to the taxpayer.

Since this is an appeal and not a petition for *certiorari*, the granting of the Motion to Dismiss or Affirm would constitute a holding of this Court with respect to this issue, as well as others presented on this appeal. We

---

2 In his concurring opinion in *Washington Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 764 (1978), Justice Powell remarked that the Court's statement concerning the record in the case "cannot be questioned." It strains credulity to argue, as appellees do (Motion at 15-16), that this means that he would bar proof on this issue in all future cases. *Compare City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 379 (1974) (Powell, J. concurring) where it is plainly advanced, in a similar context, that the Court's decision should *not* be read as barring proof in future cases.

submit that such a constitutional ruling of far reaching significance—one which would substantially eliminate one of the four prongs of the *Complete Auto* test—should not be made without the benefit of a full factual record and without full consideration after briefs and argument here.

Appellees correctly note that the foregoing claims are closely tied to appellants' observation that the Severance Tax was "tailored" to fall on out-of-state residents. Four coal-producing taxpayers now before this Court pay substantially all of this tax; prior to adoption of the thirty percent (30%) rate, they had contracted to shift the effects of the tax primarily to non-Montana utility companies and thus to citizens of other states. These facts were known to the legislature when it adopted the tax. The best evidence of the relative political influence of these groups in the Montana legislature is the current thirty percent (30%) rate of the tax.

It is precisely such considerations which call for special scrutiny here, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 n.15 (1977), and which distinguish cases such as *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974), based solely on Due Process or Equal Protection grounds from those which involve delicate Commerce Clause considerations, as well. *See Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 n.3 (1973). In the end, it is electricity ratepayers in other states who are both effectively excluded from the political process in Montana and who are being forced to pay substantially *more* than their own way. That is one vice of this tax. Further inquiry, both by this Court and at trial, is necessary to protect these Commerce Clause interests from further erosion. *See Austin* v. *New Hampshire*, 420 U.S. 656, 662 (1975).

VI.

THE MONTANA TAX CONTRAVENES THE SUPREMACY CLAUSE

We advert briefly to appellants' Supremacy Clause claims:

A. While both appellees and the Montana Supreme Court profess difficulty in discerning the effect of the federal statutes on which appellants rely, other states do not share that disability, as the *amici* briefs of Texas and Minnesota vividly show.

B. Appellees do not contest the fact that there is a federal policy designed to ensure the production and use of coal as a primary energy resource of the Nation, but adopt—as though it were dispositive—the erroneous holding of the court below that this policy favors the production of eastern and midwestern coal, as opposed to western coal. (Motion at 21-22). This is simply not so. The 1977 Amendments to the Clean Air Act, to which appellees refer, will ultimately have the effect of continuing the production of eastern and midwestern coal at approximately current levels. At the same time, however, the Amendments continue the predominant position of western low-sulphur coal in meeting our Nation's energy needs.[3] *See, e.g.*, H.R. Rep. No. 294, 95th Congress, 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Admin. News 1077-1577 at 1245.

---

3 Thus, the Department of Energy has predicted that western coal production will climb by 11% per annum through 1995, while eastern production may grow by only 3.2% per year. Department of Energy, *Energy Supply and Demand in the Midterm: 1985, 1990 and 1995* at 106 (April 1979). *See also* Environmental Protection Agency, *EPA Tables Relating to New Standards for New Coal-Fired Power Plants* at Table 4 (May 25, 1979).

This is but one illustration of the many errors which could have been avoided if the parties had been permitted to present evidence which illuminated national policies.

C. In their final argument, appellees brush off important federal rights which lie at the heart of the Mineral Lands Leasing Act of 1920 (the "Act"). Fully three-quarters of the coal in Montana belongs to the federal government; the vast bulk of that coal remains to be leased for extraction pursuant to the Act, as amended.

It is specifically alleged in this case (Complaint ¶ 42, Apdx. 59a) that the purpose, intent and effect of the Coal Severance Tax was to appropriate to Montana the "economic rents" attributable to the extraction of federally-owned coal in Montana, and thus to deprive the federal government—and through it, the people of the United States—of the economic benefits of this vast nationally-owned resource.

To rely—as both appellees and the Montana Supreme Court do—on a proviso in that Act (30 U.S.C. § 189) is to stand the Act on its head. *Mid-Northern Oil Co.* v. *Montana*, 268 U.S. 45 (1925), which construed that proviso, did not raise the question presented here. The tax in that case amounted to one percent (1%) of value and was presumably related to legitimate governmental costs. The proviso certainly extends to such taxes, but cannot be expanded without limit.

In this context, the present "tax" is not a "tax" at all; it is a "tribute" which substantially frustrates and impairs the central purpose of the Act by appropriating to Montana revenues which ought to go in the first instance to the federal government.

CONCLUSION

For each of the reasons set forth above and in appellants' Jurisdictional Statement, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant Westmoreland Resources, Inc.

November, 1980

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants except Western Energy Company

NO. 80-581

NOV 12 198

MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

--against--

STATE OF MONTANA, et al.,

Appellees,

On Appeal From The Supreme Court
Of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

ROBERT T. STEPHAN
Attorney General of Kansas

BRUCE E. MILLER
Deputy Attorney General
of Kansas

Kansas Judicial Center
Second Floor
Topeka, Kansas, 66612
(913) 296-2215

Attorneys for Kansas

NO. 80-581

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

--against--

STATE OF MONTANA, et al.,

Appellees,

On Appeal From The Supreme Court
Of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

ROBERT T. STEPHAN
Attorney General of Kansas

BRUCE E. MILLER
Deputy Attorney General
of Kansas

Kansas Judicial Center
Second Floor
Topeka, Kansas, 66612
(913) 296-2215

Attorneys for Kansas

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 2

THE QUESTIONS PRESENTED
ARE SUBSTANTIAL 6

CONCLUSION. 10

TABLE OF AUTHORITIES

CASES

Heiler v. Thomas Colliery Co.,
260 U.S. 245 (1922). 7

Oliver Iron Co. v Lord
262 U.S. 172 (1923). 7

Hope Gas Co. v. Hall
274 U.S. 284 (1927). 7

STATUTES

Montana Code Annotated,
15-35-101, et seq. 6

OTHER AUTHORITY

Survey of Electric Utility
Demand for Coal 197-322,
336-43, (Argonne National
Laboratory, August 1979.) 3

NO. 80-581

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

--against--

STATE OF MONTANA, et al.,

Appellees,

On Appeal From The Supreme Court
Of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

The State of Kansas, by and through its Attorney General, Robert T. Stephan, appears *parens patriae* on behalf of its citizens and files this brief pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Long-term coal contracts between Kansas electric utility companies and Wyoming coal producers require the purchase of hundreds of millions of tons of low-sulphur coal from Wyoming during the remainder of this century. One such utility alone, The Kansas Power and Light Company, is committed to purchasing 276,136,000 tons of Wyoming coal during the remainder of a contract expiring in the year 2013.

Annual demand for coal to serve new power plants in Kansas--those planned but not yet in operation--has been projected to equal more than ten million tons by 1992, with total shipments in that year of coal from Wyoming to Kansas amounting to more than sixteen million tons. See Argonne National Laboratory, Survey of Electric Utility Demand for Coal 197-322, 336-43 (August 1979).

Kansas utilities have been driven to look to Wyoming coal, in large part, by Federal clean air and energy statutes. Coal mined in the western states--principally Wyoming and Montana--meets air-quality requirements of Federal law far better than coal from any other region. These two states together have 68 percent of the nation's low sulphur coal. At the same time, utilities in Kansas and elsewhere are

now under great pressure, again principally from Federal statutes, to use coal instead of other fuels. As a practical matter, Kansas utilities can fulfill their needs for energy resources and their obligations to their customers only through the use of such coal.

As one consequence of these Federal mandates, the citizens of Kansas are captives of state tax policies in other states which are, therefore, in a position to take extraordinary and unreasonable economic advantage of their plight. Wyoming and its local subdivisions presently impose large severance taxes on the value of this coal, amounting to approximately 17-1/2 percent of value. Since fuel-related costs of electricity generation flow into consumers' monthly bills, these taxes are ultimately borne by the

consumers of electric energy in, among other places, Kansas. The net effect of such taxes is to shift millions of dollars from Kansas consumers to the Wyoming treasury.

Massive amounts are involved. At present tax rates and at the current prices of coal, about $1.00 per ton is paid by Kansas Power and Light to the State of Wyoming in severance taxes. As the price of the coal escalates, of course, the amount of the tax will increase as well, even assuming the Wyoming tax rate remains unchanged. By 1987, it is estimated at least $26.5 million per annum will be shifted from Kansas consumers to the State of Wyoming through these taxes.

The questions presented in this appeal arise out of a constitutional

challenge to the 30 percent Montana Coal Severance Tax (Montana Code Annotated, 15-35-101 et seq.), but they have equal application to Wyoming's power to continue, and potentially to increase, its taxes. They are, therefore, of great interest to the citizens of Kansas.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by this appeal are substantial from both a practical and a constitutional point of view. To avoid burdening the Court with unnecessary argument, we simply subscribe to the arguments set forth in appellants' Jurisdictional Statement, adding the following comments:

1. The Montana Supreme Court held that the Commerce Clause imposes no limit on the power of the states to tax

energy resources destined for immediate delivery to other states, relying on a series of older cases. See Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); Hope Gas Co. v. Hall, 274 U.S. 284 (1927). The principal issue presented by appellants' Commerce Clause claim is one which has not been examined here for more than 50 years. Both practical circumstances and constitutional doctrines have changed markedly over the intervening decades. They strongly recommend reconsideration of those old decisions.

No one in this proceeding has suggested the Commerce Clause deprives the states of their power to tax extraction of energy or other resources located within their borders, at least to the extent that such taxes bear some

fair relation to services and protection provided by the state. At the same time, excessive taxation which falls principally on resources destined for other states--taxation all out of proportion to the legitimate needs of the taxing state--has serious effects on consumers in those states and on our nation-wide economy. The facts of this case bring these effects into vivid focus. The practical effect is that citizens of coal-poor states where electric generation is coal-fired--such as Kansas--may effectively be held hostage to those which happen to be rich in that mineral resource. It is clear excessive taxes, such as the Montana tax is alleged to be, are antithetical to the principles underlying the Commerce Clause and should, in appropriate circumstances, be struck down under that Clause.

2. The Montana Supreme Court also held it could discern no Federal policy which could be frustrated by Montana's tax. That holding, derived without any factual record, does not conform to practical reality. The electric utility companies serving Kansas are among the leaders of their industry in converting electrical generation from oil to coal-fired. In doing so, the utilities have done more than any other institution to move the nation from dependence on foreign oil toward secure, domestic fuels. This conversion has taken place in response to the mandates of a clear national policy.

Excessive taxes manifestly have the potential to frustrate Federal policies by making coal unnecessarily expensive, thereby discouraging its production and use. At some point,

excessive taxes should be held to be contrary to national policies which encourage, require, or mandate the use of coal. Appellants' have argued that Montana's tax has reached that point. They should be given an opportunity to prove their allegations.

CONCLUSION

For the reasons set forth above, and for those contained in the appellants' Jurisdictional Statement, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

DATED: November 6, 1980.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General
of Kansas

BRUCE E. MILLER
Deputy Attorney
General of
Kansas

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT were mailed by depositing same in the United States Mail, first class postage prepaid, this 7th day of November, 1980, to:

HON. MICHAEL T. GREELY, Attorney General of Montana, State Capitol, Helena, Montana, 59601; WILLIAM J. CARL, ESQ., Senior Counsel, Montana Power Company, 40 East Broadway, Butte, Montana, 59701; ROGERS & WELLS, Attorneys at Law, 200 Park Avenue, New York, New York, 10166; HON. MARK WHITE, Attorney General of Texas, Supreme Court Building, P.O. Box 12548, Austin, Texas, 78711; LEO F. J. WILKING, ESQ., Special Assistant Attorney General for State Tax Commissioner, State Tax Department, State Capitol, Bismarck, North Dakota, 58505.

Bruce E. Miller

Bruce E. Miller
Deputy Attorney General
of Kansas

No. 80-581

NOV 17 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc. and Western Energy Company,

Appellants,

against

State of Montana, Thomas L. Judge, Governor of Montana, Mary Craig, Director of the State Department of Revenue, and David M. Lewis, Director of Administration and State Treasurer,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF MINNESOTA, IOWA, MICHIGAN AND WISCONSIN IN SUPPORT OF JURISDICTIONAL STATEMENT

WARREN SPANNAUS
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Special Assistant
Attorney General
515 Transportation Bldg.
St. Paul, Minnesota 55155
(612) 296-7537
THOMAS J. MILLER
Attorney General
State of Iowa
FRANK J. KELLEY
Attorney General
State of Michigan
BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

Of Counsel:
KAREN G. SCHANFIELD
Special Assistant
Attorney General
515 Transportation Bldg.
St. Paul, Minnesota 55155
(612) 296-8998

224-7631 — Review Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the Amici Curiae	2
Summary of Argument	3
Argument	4
I. A STATE LAW WHICH FRUSTRATES OR IMPAIRS FEDERAL POLICY IS INVALID UNDER THE SUPREMACY CLAUSE.	4
II. NATIONAL ENERGY POLICY FAVORS THE PRODUCTION AND USE OF COAL IN LIEU OF PETROLEUM FUELS	5
III. THE MONTANA COAL SEVERANCE TAX IS INVALID BECAUSE IT FRUSTRATES THE EXPRESS GOALS OF THE FEDERAL GOVERNMENT	6
Conclusion	7

TABLE OF AUTHORITIES

	Page
Cases:	
DeCanas v. Bica, 424 U.S. 351 (1976)	4
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	4
Hines v. Davidowitz, 312 U.S. 52 (1941)	4
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	4
Malone v. White Motor Corp., 435 U.S. 497 (1978)	4
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)	4
Montana Code:	
Mont. Rev. Code Ann., § 84-1312 *et seq.*	2

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-581

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc. and Western Energy Company,

Appellants,

against

State of Montana, Thomas L. Judge, Governor of Montana, Mary Craig, Director of the State Department of Revenue, and David M. Lewis, Director of Administration and State Treasurer,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF MINNESOTA, IOWA, MICHIGAN AND WISCONSIN IN SUPPORT OF JURISDICTIONAL STATEMENT

INTEREST OF AMICI CURIAE

Amici Curiae, the States of Minnesota, Iowa, Michigan and Wisconsin, have historically looked to the State of Montana for the coal to satisfy a significant portion of their energy needs. A sizeable share of the coal produced in Montana is purchased by energy consumers in other states who in return provide to the State of Montana a significant share of the revenue which it collects in the form of coal severance taxes. Because it is estimated that Amici's consumption of Montana coal will increase substantially by the middle of this decade, their obligation for payment of coal severance taxes to Montana will increase geometrically if the 30 percent Montana Coal Severance Tax, Mont. Rev. Codes Ann., § 84-1312 *et seq.*, is allowed to stand.

In accordance with Appellants' position, the Amici maintain that the imposition of a 30 percent tax on coal mined in Montana at a time when federal energy policy is directed toward increased reliance on coal as a substitute for imported oil and domestic reserves is contrary to the Supremacy Clause of the United States Constitution. The two Montana courts which have had the opportunity to address this issue have determined that, as a matter of law, the Coal Severance Tax does not violate the Supremacy Clause. In so doing, both courts have refused to discern the impact of the tax on federal energy policy. If this Court were to allow the decision of the Montana courts to stand, it would thereby demonstrate that a state may undermine the clear mandate of the federal government with impunity.

Because the validity of the Montana Coal Severance Tax has a direct and substantial effect upon the Citizens of other states, the Amici present their views to the Court. It is hoped

that the Court will find the views expressed herein helpful in deciding to note probable jurisdiction.

SUMMARY OF ARGUMENT

A state law which impedes or frustrates federal policy or objectives is invalid under the Supremacy Clause of the United States Constitution. In recent years, the federal government, through its laws, regulations and express declarations, has fashioned an energy policy which favors the use and production of coal, particularly the low sulfur coal found in the western states, as a substitute for oil and natural gas. By increasing the severance tax on its coal to an unprecedented level, the State of Montana has increased the cost of coal to its sister states to such a degree that it has undermined important federal policies which favor an increase in the consumption of coal relative to petroleum products.

ARGUMENT

I. A STATE LAW WHICH FRUSTRATES OR IMPAIRS FEDERAL POLICY IS INVALID UNDER THE SUPREMACY CLAUSE.

This Court recently reaffirmed the parameters of the preemptive effect of the Supremacy Clause in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), when it stated that state action which conflicts with federal law or would frustrate the federal scheme must be invalidated. Id. at 321. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) it was recalled that:

> A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Jones v. Rath Packing Co.*, supra, 430 U.S. at 526, 540-541, 97 S.Ct. at 1310, 1316-1317. *Accord, De Canas v. Bica*, 424 U.S. 351, 363, 96 S.Ct. 933, 940, 47 L.Ed.2d 43 (1976).

Id. at 158.

The clear thrust of the Supremacy Clause doctrine has thus been to invalidate state laws which frustrate or undermine federal policy.

II. NATIONAL ENERGY POLICY FAVORS THE PRODUCTION AND USE OF COAL IN LIEU OF PETROLEUM FUELS.

The record herein contains extensive documentation of the national energy policy as presented to the Montana court. In the interest of brevity, a description of the contours of that policy is not repeated here. Suffice it to say that the Amici disagree with the Montana court's finding that no national energy policy is discernible as a matter of law (Appendix to Jurisdictional Statement at 34-35a) and maintain that the myriad of federal enactments and statements to which Appellants have directed the Court's attention demonstrate a cohesive federal energy policy which favors the use of coal as a substitute for petroleum products.

III. THE MONTANA COAL SEVERANCE TAX IS INVALID BECAUSE IT FRUSTRATES THE EXPRESS GOALS OF THE FEDERAL GOVERNMENT.

A series of recent congressional enactments and presidential directives has encouraged the use of coal as a substitute for petroleum products. In affirming the trial court's dismissal of the complaint, the Montana Supreme Court denied plaintiffs the opportunity to present evidence on the question of the effect of the Coal Severance Tax on federal energy policy. Logic dictates that the increased tax serves to frustrate that policy.

Forcing energy consumers to pay a significantly higher rate for coal clearly makes coal a less attractive energy source. By doing so at a time when the thrust of federal activity encourages increased reliance on coal, the state of Montana frustrates this country's goal of lessening its dependence on imported and domestic oil. Because it creates strong disincentives against the use of coal as an energy source, the Montana Coal Severance Tax cuts against an important national goal and should be invalidated under the Supremacy Clause.

CONCLUSION

This case presents timely questions of national importance for determination by this Court. Amici Curiae join the Appellants in urging that the court note probable jurisdiction herein.

Dated: Nov. 14, 1980

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Special Assistant
Attorney General
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-7537
THOMAS J. MILLER
Attorney General
State of Iowa
FRANK J. KELLEY
Attorney General
State of Michigan
BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

Of Counsel:
KAREN G. SCHANFIELD
Special Assistant
Attorney General
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-8998

No. 80-581

Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

vs.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, AND DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF NEW JERSEY IN SUPPORT OF JURISDICTIONAL STATEMENT

JOHN J. DECNAN
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

STEPHEN SKILLMAN
Assistant Attorney General
State House Annex
Trenton, New Jersey 08625
(601) 292-4965

CLAUDE E. SALOMON
Deputy Attorney General
1100 Raymond Boulevard
Newark, New Jersey 07102
(201) 648-4734

November, 1980

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
INTEREST OF THE STATE OF NEW JERSEY	2
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	3
CONCLUSION	5

Cases Cited

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	4
Department of Revenue v. Assn. of Washington Stevedoring Companies, 435 U.S. 734 (1978)	3, 4
Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)	4
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	5
Oliver Iron Co. v. Lord, 262 U.S. 172 (1923)	4
Perez v. Campbell, 402 U.S. 637 (1971)	5

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

vs.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, AND DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF NEW JERSEY IN SUPPORT OF JURISDICTIONAL STATEMENT

Interest of the State of New Jersey

New Jersey is an energy consuming state. In the past, its electric utilities have derived a substantial portion of their power from oil. However, most recently, New Jer- has been forced by rising costs and Federal energy policy to look to coal as the generation source of electric power. A combination of economics and Federal energy policy are expected to continue to induce a substantial rise in the use of coal by New Jersey and other Northeastern States.

New Jersey utilities have historically not used coal from Montana and the Rocky Mountain area since rail transportation has always added a prohibitive cost factor to its use in the Northeast. New Jersey coal sources are West Virginia, Virginia and Pennsylvania, with a smaller amount coming from Kentucky and Georgia. In 1979, New Jersey utilities purchased over two million tons of coal.* New Jersey has also been increasing its consumption of power generated by coal. The most recent figures indicate that New Jersey electric utilities burned 300,000 more tons of coal in the period of January through August 1980 than they did through the same period of 1979. New Jersey expects that the coal consumption will steadily increase throughout the contemplated future.

Presently those states which supply the coal needs of New Jersey and the bulk of the Northeast have relatively low severance taxes on the production of this energy source. However, New Jersey fears that if this excessive Montana tax is allowed to stand, the Eastern coal-producing states will, in turn, raise their severance taxes to collect a simi-

---

* This figure excludes any electric power (generated by coal) which was purchased by New Jersey utilities from utilities located in other states.

lar amount from what is admittedly a vast source of revenue.* This will result in the unfettered interests of the energy producing states being pitted against those of the energy consuming states.

As a consumer state, New Jersey has an interest in seeing that an energy-rich state is not permitted to override national objectives for its own financial gain. Any constitutional rule which permits such assault by one state or group of states upon others surely frustrates national energy policy as well as striking at the heart of the policies underlying the Commerce Clause.

The Questions Presented are Substantial

The State of New Jersey subscribes to the arguments set forth in appellants' Jurisdictional Statement, and shall not burden the Court by repeating them at length. However, New Jersey wishes to add some comments herein.

The Supreme Court of Montana has, in its affirmance of the Montana coal severance tax, held that the "trend" of the law lies in the direction of allowing a state to tax local products which eventually flow in interstate commerce once some nexus with that state has been established. This was held to be so regardless of how burdensome that tax is upon interstate commerce. The Court below did not consider factually the question of the fair relation of the revenues generated by the tax to the services alleged to be provided by the state, one of the four standards articulated by this Court to measure the validity of state regulation of interstate commerce. *Department of*

---

* Montana will receive an estimated $1.5 billion in coal severance tax revenues during 1979-85 period. This is 6.4 times greater annual coal revenues than its estimated 1978 coal revenues of $33.6 million.

Revenue v. *Assn. of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978); *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977).

In support of its position, the Court below relied strongly on a series of cases which are over fifty years old, and which were decided when natural resources first began to move substantially in interstate commerce, *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245 (1922); *Oliver Iron Co.* v. *Lord,* 262 U.S. 172 (1923). Appellants have argued that a tax "tailored" to fall principally upon non-residents substantially affects interstate commerce, and therefore should be measured against the four-pronged test articulated in *Complete Auto Transit.* The contention should be given due consideration and not brushed aside lightly. Montana's excessive coal tax, levied at a rate in gross disproportion to the fair needs of the taxing state, seriously affects those consuming states which depend on western coal; it may also be a dire portent of future divisions between energy-rich and energy-poor states. Therefore, such taxes should be declared in violation of the Commerce Clause in appropriate circumstances.

The Supreme Court of Montana also rejected, as a matter of law, appellants' contentions that this tax frustrates national energy policy and is therefore preempted under the Supremacy Clause. The Court below justified its decision by holding that it could not discern any national policy favoring the use of coal with which the tax conflicts or which is substantially frustrated by the tax. New Jersey submits that Congressional intent has been expressed in the scheme of legislation confirming and promoting a policy of the maximum use of domestic resources including coal. When it is weighed against the oppressive nature of a tax which discourages the use of this

natural resource, then the tax must be voided. The state legislation stands as an obstacle to the accomplishment of Congress because the practical effect of the tax is to impede the implementation of federal policy. *Perez* v. *Campbell,* 402 U.S. 637 (1971). *See also Jones* v. *Rath Packing Co.,* 430 U.S. 519, 540-43 (1977). Therefore, Montana's view that preemption exists only where a state law specifically and directly conflicts with a federal statutory provision is unduly narrow.

CONCLUSION

The Jurisdictional Statement filed in this cause discusses substantial federal questions presented in the construction of the Montana coal severance tax. Those questions include interpretations of the Commerce Clause, the supremacy of federal law, and the role of competing state interests within our federal system. Resolution of those questions is important to states who consume energy sources. Therefore, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey
State of New Jersey

STEPHEN SKILLMAN
Assistant Attorney General

CLAUDE E. SALOMON
Deputy Attorney General

Dated: November 12, 1980.

NO. 80-581

Supreme Court, U. S.
FILED
NOV 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, et al.,
Appellants,

vs.

STATE OF MONTANA, et al.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF JURISDICTIONAL STATEMENT

MARK WHITE
Attorney General of Texas
Counsel of Record

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY III
Executive Assistant

JAMES R. MEYERS
Assistant Attorney General

JUSTIN ANDREW KEVER
Assistant Attorney General

JOHN STUART FRYER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3016

Attorneys for the State of Texas

Of Counsel:
DONALD A. GARRITY
Garrity, Keegan & Brown
1400 Eleventh Avenue
Helena, Montana 59601
(406) 442-8711

Dated: November, 1980

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE STATE OF TEXAS IN THE RESOLUTION OF THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED 2

ENERGY PRODUCTION AND CONSUMPTION ARE SUBJECT TO FEDERAL CONTROL 2

THE IMPACT OF THE TAX UPON THE STATES AND UPON THE FEDERAL ENERGY PROGRAM IS SUBSTANTIAL 4

ARGUMENT: THE TAX SHOULD BE EXAMINED 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page**

Hines v. Davidowitz, 312 U.S. 52 (1941) 6

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 2

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 6

Constitutions and Statutes

Emergency Petroleum Allocation Act of 1973, Pub.L. 93-511, 88 Stat. 1608 2,3

Energy Conservation and Production Act, Pub.L. 94-385, 90 Stat. 1125 3

Energy Policy and Conservation Act of 1976, Pub.L. 94-163, 89 Stat. 871 3

Energy Reorganization Act of 1976, Pub.L. 94-438, 88 Stat. 1233 2

Energy Supply and Environmental Coordination Act of 1974, Pub.L. 93-319, 88 Stat. 246 2,3

Federal Nonnuclear Energy Research and Development Act of 1974, Pub.L. 93-577, 88 Stat. 1878 2

Natural Gas Policy Act of 1978, Pub.L. 95-621, 92 Stat. 3350 3

Powerplant and Industrial Fuel Use Act, Pub.L. 95 -620, 92 Stat. 3289 3

House Joint Interim Committee on a State Energy Plan, 66th Legislature of Texas, Report (1980) 2

U. S. Const. art. I, §8, Cl. 3 1

U.S. Const. art. VI, Cl. 2 ..... *passim*

Other Authorities

Annot., 1 EN.MNGM'T (CCH) Para.3745 3

R. Stobaugh and D. Yergin, *Energy Future* (1976) 3

United States Department of Energy Study, "Analysis of Proposed U.S. Department of Energy Regulations Implementing the Powerplant and Industrial Fuel Use Act," (November 1978) 4

NO. 80-581

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, et al.,
Appellants,

vs.

STATE OF MONTANA, et al.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF MONTANA

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF JURISDICTIONAL STATEMENT

The Jurisdictional Statement filed in this cause discusses substantial federal questions presented in the construction of the Montana coal severance tax. Those questions include restrictions of the Commerce Clause upon the states, supremacy of federal law, and the role of competing state interests within our federal system. Those questions are substantial in regard to constitutional jurisprudence. Resolution of those questions is of equal substance and importance to states who consume, produce, and tax energy resources.

INTEREST OF THE STATE OF TEXAS IN THE RESOLUTION OF THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

Energy Production and Consumption Are Subject to Federal Control

Texas has led the nation in the production of energy for the past fifty years. One-fourth of all energy ever produced in this country has come from the state, mostly in the form of oil and natural gas, with cumulative production of 42 billion barrels of oil and 212 trillion cubic feet of gas.[1] The availability of this once cheap and abundant energy supply has made the Texas economy dependent upon energy. Among the fifty states, Texas is the leader in energy consumption.[2]

The wellhead price of natural gas sold in the interstate market has been subject to federal controls since 1954.[3] Federal involvement in energy production and consumption became preeminent in the past decade. The OPEC oil embargo of 1973, and the continuing energy crisis that followed it, prompted Congress to enact a series of laws confirming and promoting a policy of obtaining the maximum possible use of this nation's relatively plentiful domestic fuels, such as coal, in preference to scarce and costly fuels such as imported petroleum and natural gas.[4]

[1] Report of the House Joint Interim Committee on a State Energy Plan, Texas House of Representatives, 66th Legislature at 1.

[2] *Id.*

[3] In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), this Court determined that the regulatory jurisdiction of the Federal Power Commission (now Federal Energy Regulatory Commission) extended over rates of all wholesales of natural gas in interstate commerce.

[4] *See*, e.g., the Emergency Petroleum Allocation Act of 1973 (Pub.L. 93–511, 88 Stat. 1608); the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub.L. 93–577, 88 Stat. 1878); the Energy Reorganization Act of 1974 (Pub.L. 94–438, 88 Stat. 1233); the Energy Supply and Environmental Coordination Act of 1974 (Pub.L. 93–319,

The United States could no longer depend upon imported petroleum. Natural gas must be conserved for its highest and best uses. Rather than trust market forces to shift consumption patterns, Congress attempted to determine legislatively the types of fuel Texas and the nation would consume. At the same time Congress was controlling demand, it wished to protect consumers from the effects of increasing prices of energy. Wellhead controls of natural gas prices were extended to gas produced and consumed wholly within a state.[5] The price of domestic crude oil was held substantially below levels on the world market.[6]

The Powerplant and Industrial Fuel Use Act of 1978,[7] which attempts to conserve petroleum and natural gas for uses other than as boiler fuel, is a key element in the federal conservation program. The Act prohibits new electric power plants from using oil or natural gas as a primary fuel source and prohibits the use of natural gas in existing facilities after 1989. Further, unless natural gas was used as a primary source during 1977, its use is banned before the January 1, 1990, deadline; plants meeting the 1977 usage exception are limited to their historical consumption. Exemptions from the regulations will be granted only in certain limited circumstances, and the Act "is expected to force utilities to increase their demand for coal."[8]

The consequences of the federal energy policy are significant. Environmental and safety considerations prevent significant nuclear power contributions. Reliable power in commercial quantities from the sun, wind, or waves may be decades away.[9] Texas and other states will be forced to

88 Stat. 246); the Energy Policy and Conservation Act of 1976 (Pub.L. 94–163, 89 Stat. 871); the Energy Conservation and Production Act (Pub.L. 94–385, 90 Stat. 1125); and the Powerplant and Industrial Fuel Use Act (Pub.L. 95–620, 92 Stat. 3289).

[5]Natural Gas Policy Act of 1978, Pub. L. 95–621, 92 Stat. 3350.

[6]Emergency Petroleum Allocation Act of 1973 and Energy Policy and Conservation Act of 1976, *supra*, n. 4.

[7]*Supra*, n. 4.

[8]1 EN. MNGM'T (CCH) ¶3745.

[9]*See* R. STOBAUGH & D. YERGIN, ENERGY FUTURE (1979).

substitute large amounts of coal for the natural gas and oil presently used to fuel utility and other industrial boilers. Geography and environmental considerations militate Texas and other states to use low sulphur western coal. Since twenty-five percent of the nation's coal reserves are located in Montana, consuming states will have to use Montana coal.

The Impact of the Tax Upon The States and Upon the Federal Energy Program Is Substantial

Texas' concern with the Montana tax arises in several interrelated contexts.[10] First, utilities serving Texas consumers are committed to purchase Montana coal. The City of Austin, for example, will be burning large amounts of the coal in its electric generating facilities. The Fayette I facility, to be operated by Austin and the Lower Colorado River Authority, will purchase fifty million tons of Montana coal during the twenty-five year term of its contract with Decker Coal Company. Houston Lighting & Power will purchase 176 million tons of Montana coal for use in its own facilities. The interests of the state and its citizens, as consumers and ratepayers of electricity produced from the combustion of that coal, are greatly affected by the tax and consequent cost of that coal. Texas' concern in this regard is not limited to disfavoring a net transfer of wealth from its citizens to the Montana treasury. We are concerned that the artificial added cost of energy imposed by the tax will either prevent new industries from developing in Texas or

[10]Because of Texas' long reliance on its own natural gas and petroleum, and because it lacks substantial deposits of high-quality coal, the shift to increased coal use will be far more difficult and costly for Texas than for other areas of the country. Based upon a United States Department of Energy Study, "Analysis of Proposed U.S. Department of Energy Regulations Implementing the Powerplant and Industrial Fuel Use Act" (November 1978), approximately one-half of national conversion costs associated with the Powerplant and Industrial Fuel Use Act will be borne in Texas. Texas concerns involve, in part, exacerbation of those conversion costs by the additional tax burden exacted.

encourage existing industry to leave the state in order to find cheaper energy elsewhere.

Second, Texas fears that if the Montana tax is allowed to stand, other coal producing states will raise their tax structures to the Montana level. Such a result would subject most of the coal consumed in Texas to the tax. Consumers would have few alternatives. They could look abroad for competing sources of coal,[11] or they could suffer the consequences of decreased energy production. In any case, the federal program seeking to replace coal for the use of oil and gas would be hampered significantly by the high costs imposed.[12]

Third, the high level of the Montana tax could spur other states to tax their own resources accordingly. Some states would be encouraged to discover new sources of tax revenues from goods sold upon the national economy. Other states may simply tax old sources at new rates. In Texas, for example, there presently is no severance tax upon coal. Oil is taxed at 4.6% of value and natural gas at 7.5% of value. Although much of the energy produced in Texas is consumed within the state, and there would be political constraints imposed by those consumers, it is possible that the Texas Legislature will at least consider escalating Texas' own severance taxes. A resolution of the issues presented by the instant appeal would provide a useful measure for legislative action, if not a constraint upon the prospect of such tax initiatives.

Finally, Texas' concern might be expressed best as a concern regarding federalism. If Texas were autonomous, it would use its own energy resources for domestic pur-

[11]This result, of course, is directly contrary to the purposes of the entire panoply of statutes constituting the national energy policy. The tax which is the subject of this litigation thus serves to frustrate the national energy policy of energy independence by substituting a dependence on foreign coal for a dependence on foreign oil.

[12]As *amicus curiae* in the proceedings below, Texas argued that the Montana tax substantially impaired and frustrated the federal program. That argument will be presented, as *amicus curiae*, to this Court, upon consideration of the Montana court's decision.

poses and export the remainder at the price level of the world market. Texas would not need Montana coal. Texas is not autonomous and neither is Montana. Texas and Montana must exist and do exist as sister states within a union of states. That union has determined that Texas cannot use its own resources for certain purposes; Texas oil and natural gas must be saved for use elsewhere and then must be sold at federally mandated prices. The federal energy program, and the Constitution under which all federal laws and state actions must proceed, prevent Texas from acting in a parochial manner to the detriment of the nation as a whole. In that way it should prevent any state from inordinately benefiting from any federal response to a national problem.

ARGUMENT: THE TAX SHOULD BE EXAMINED

Texas believes that the Montana coal severance tax presents substantial constitutional questions appropriate for this Court's review.[13] Although each of those questions merit such attention, Texas has focused upon one question which it feels is of particular substance. That question is whether, absent specific limitation, the Montana coal severance tax is preempted or invalidated as frustrating or impairing the full objectives and purposes of Congress in enacting its federal energy program.

Texas believes that when the tax, the congressional program and the Supremacy Clause, as interpreted in *Hines v. Davidowitz*, 312 U.S. 52 (1941) and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), are considered, the tax cannot stand. Accordingly, the decision of the Montana Supreme Court should be reviewed.[14]

[13] In consideration of this Court's many responsibilities and finite resources, Texas will not repeat the arguments aptly presented in appellants' Jurisdictional Statement.

[14] As noted, Texas as *amicus curiae* below has limited its argument to the preemption doctrine and the pervasive federal energy policy. Although we have concentrated our efforts in that regard, we do not wish to minimize the importance of the other substantial federal questions presented.

CONCLUSION

Texas supports the Jurisdictional Statement of appellants in this cause and for the reasons expressed above, Texas urges the Court to note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY III
Executive Assistant Attorney General

JAMES R. MEYERS
Assistant Attorney General

JUSTIN ANDREW KEVER
Assistant Attorney General

JOHN STUART FRYER
Assistant Attorney General

Post Office Box 12548,
Capitol Station
Austin, Texas 78711

Attorneys for State of Texas

No. 80-581

Office-Supreme Court, U.S.
FILED
JAN 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF APPELLANTS

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant Westmoreland Resources, Inc.

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
THOMAS A. BUDEWITZ
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants except Western Energy Company

January, 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, *et al.*,

Appellants,

—against—

STATE OF MONTANA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF APPELLANTS

QUESTIONS PRESENTED

This action, challenging the constitutionality of a 30% severance tax imposed by the State of Montana on coal mined in the state, presents the following questions:

1. Did the state court err in holding that the State of Montana may, without violating the Commerce Clause, tax without limit the severance of coal which is largely federally owned and destined for immediate shipment to other states?

2. Did the state court err in holding, without any factual examination whatsoever, that the 30% severance

tax is "fairly related" to the services and protection provided by the state to the taxpayer merely because Montana affords the benefits of a civilized society?

3. Did the state court err in rejecting plaintiffs' claim that the Montana Coal Severance Tax discriminates against interstate commerce notwithstanding the fact that the tax was manifestly "tailored" to fall principally on persons in states other than Montana?

4. Did the state court err in rejecting plaintiffs' claim that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the effectiveness of federal statutes intended to encourage the production and use of coal in general, and particularly western coal, and despite defendants' admission, for purposes of the present proceeding, of the truth of the underlying facts?

5. Did the state court err in denying plaintiffs an opportunity to prove at a trial their claim that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution, despite plaintiffs' allegation and proffer of proof that the tax substantially frustrates the national policy embodied in the Mineral Lands Leasing Act of 1920 which reserved federally-owned coal to the federal government and allocated the revenues, as between the states and the federal government, in a fixed proportion?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Supreme Court of the State of Montana are listed in the caption, except that, pursuant to Supreme Court Rule 40.3, Ted Schwinden, Helen J. Feaver and Maurice L. Brusett have been substituted as defendants for Thomas L. Judge, Mary Craig and David M. Lewis, respectively.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	1
PARTIES TO THE PROCEEDINGS BELOW	3
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	v
DECISION OF THE COURT BELOW	4
JURISDICTIONAL BASIS OF THIS APPEAL	4
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
Statement of Facts	7
The Proceedings Below	12
SUMMARY OF ARGUMENT	14
Count One	14
Count Two	15
Count Three	16
ARGUMENT	17
I. A STATE TAX ON AN ACTIVITY WHICH "SUBSTANTIALLY AFFECTS" INTERSTATE COMMERCE, WHETHER OR NOT "IN" INTERSTATE COMMERCE, IS NOT IMMUNE FROM SCRUTINY UNDER AN APPROPRIATE COMMERCE CLAUSE TEST	17

PAGE

II. THE APPROPRIATE COMMERCE CLAUSE TEST HERE REQUIRES A FACTUAL DETERMINATION WHETHER THE TAX IS FAIRLY RELATED TO BENEFITS PROVIDED BY THE STATE AND WHETHER IT DISCRIMINATES AGAINST INTERSTATE COMMERCE 27

A. Plaintiffs' Claim that the Tax is Not Fairly Related to Benefits and Services Provided by the State Should Not Have Been Dismissed Without a Trial 29

B. Plaintiffs' Claim that the Tax Discriminates Against Interstate Commerce Should Not Have Been Dismissed Without a Trial 33

III. THE TAX SUBSTANTIALLY FRUSTRATES NATIONAL POLICIES WITH RESPECT TO THE PRODUCTION AND USE OF COAL AND SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE..... 35

A. National Energy Policy, as Reflected in Federal Statutes and Regulations, Favors the Increased Production of Coal Generally and of Low Sulphur, Western Coal in Particular 35

1. The National Policy to Encourage Coal Production 36

2. The National Policy to Encourage Production of Western, Low Sulphur Coal..... 37

PAGE

B. The Issue of "Substantial Frustration" Raises Questions of Fact which Require a Trial 41

IV. THE TAX SUBSTANTIALLY FRUSTRATES THE FEDERAL STATUTORY DIVISION OF ROYALTIES FROM FEDERAL COAL DEPOSITS AND SHOULD BE HELD INVALID UNDER THE SUPREMACY CLAUSE 46

CONCLUSION 50

TABLE OF AUTHORITIES

PAGE

Cases

Alaska v. *Arctic Maid*, 366 U.S. 199 (1961)..... 20

Arizona Public Service Co. v. *Snead*, 441 U.S. 141 (1979) 19, 21

Austin v. *New Hampshire*, 420 U.S. 656 (1975) ... 28

Budget Rent-a-Car of Washington-Oregon, Inc. v. *Multnomah County*, 287 Or. 93, 597 P.2d 1232 (1979)..... 31

Buttrell v. *McBride Land & Livestock*, 170 Mont. 296, 553 P.2d 407 (1976)..... 46

Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 (1950)..... 32

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 17, 24

Clark v. *Paul Gray, Inc.*, 306 U.S. 583 (1939)..... 32

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977).....13, 15, 24, 27-29, 32

Crow Tribe of Indians v. *State of Montana*, 469 F. Supp. 154 (D. Mont. 1979), *appeal pending*, (9th Cir., No. 79-4321) 25

Dayton Power & Light Co. v. *Lindley*, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979) 33

Dixie Ohio Express Co. v. *State Revenue Commission*, 306 U.S. 72 (1939)..... 32

PREVIOUS PAGE WAS BLANK

PAGE

Dunbar-Stanley Studios, Inc. v. *Alabama*, 393 U.S. 537 (1969) 20

Evansville Airport v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972) 32

Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117 (1978) 44

Exxon Corp. v. *Wisconsin Department of Revenue*, 100 S. Ct. 2109 (1980) 28

H.P. Hood & Sons, Inc. v. *Du Mond*, 336 U.S. 525 (1949) 25, 26

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 19

Heisler v. *Thomas Colliery Co.*, 260 U.S. 245 (1922).....14, 15, 17, 18, 20-23

Hill v. *Florida*, 325 U.S. 538 (1945).....16, 43, 44

Hines v. *Davidowitz*, 312 U.S. 52 (1941).....42, 49

Hope Gas Co. v. *Hall*, 274 U.S. 284 (1927)..... 17

Hunt v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977)..... 19

Ingels v. *Morf*, 300 U.S. 290 (1937)..... 32

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) 28, 31

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977).....16, 42-44

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 19

Lewis v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009 (1980) 19

PAGE

Maryland v. *Louisiana*, No. 83 Original (October 1979 Term) 30

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)..... 41

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940)..... 27

McGoldrick v. *Gulf Oil Corp.*, 309 U.S. 414 (1940) 41

McLain v. *Real Estate Board*, 444 U.S. 232 (1980). 19

Merrion v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.) (*en banc*), *cert. granted*, 101 S. Ct. 71 (1980) 25, 31

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954) 23

Mid-Northern Co. v. *Montana*, 268 U.S. 45 (1925) 49

Mobil Oil Corp. v. *Commissioner of Taxes*, 445 U.S. 425 (1980) 23, 28

Moe v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976)..... 41

Moorman Manufacturing Co. v. *Bair*, 437 U.S. 267 (1975)..... 32

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)..... 18

Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967) 43

National Geographic Society v. *California Equalization Board*, 430 U.S. 551 (1977) 28

New Jersey Insurance Co. v. *Division of Tax Appeals*, 338 U.S. 665 (1950)..... 41

PAGE

Nippert v. *City of Richmond*, 327 U.S. 416 (1946) 20, 22, 33

Norfolk & W.R. Co. v. *Tax Commission*, 390 U.S. 317 (1968) 32

Oliver Iron Mining Co. v. *Lord*, 262 U.S. 172 (1923) 17

Parker v. *Brown*, 317 U.S. 341 (1943) 20

Perez v. *Campbell*, 402 U.S. 637 (1971) 42, 43

Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) ... 19

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) .. 20, 21

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 42

Raymond Motor Transport, Inc. v. *Rice*, 434 U.S. 429 (1978) 28

United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 18

Washington Revenue Department v. *Stevedoring Association*, 435 U.S. 734 (1978) 28, 31

Weston v. *The City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829) 41

Wickard v. *Filburn*, 317 U.S. 111 (1942) 18, 21

Constitutions, Statutes & Regulations

Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.*, as amended, 42 U.S.C. (Supp. III 1979) §§ 7401 *et seq.* 5, 7, 38

§ 111, 84 Stat. 1683 38

PAGE

Code of Federal Regulations:

40 C.F.R. § 60.43 (1972) 38

40 C.F.R. § 60.45(a)(2)(1972) 38

Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. §§ 6201 *et seq.* (1976 & Supp. III 1979) 5

§ 2(6), 89 Stat. 874, 42 U.S.C. § 6201(6) (1976)..... 36

Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233..... 5

Energy Research and Development Administration Act (Authorizations and Appropriations for 1977), Pub. L. No. 95-39, 91 Stat. 180 5

Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, 15 U.S.C. §§ 791 *et seq.* (1976 & Supp. III 1979)... 5

Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083.....5, 46

Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 11

§ 317, 90 Stat. 2770, 30 U.S.C. § 191 (1976). 11

Federal Non-Nuclear Energy Research and Development Act of 1974, Pub. L. No. 95-577, 88 Stat. 1878, 42 U.S.C. §§ 5901 *et seq.* (1976 & Supp. III 1979) 5

36 Fed. Reg. 24876 (1971)..... 38

PAGE

Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437 ..... 5, 14, 16, 46-50

ch. 85, §§ 1-2, 41 Stat. 437-38 47

ch. 85, § 32, 41 Stat. 450, 30 U.S.C. § 189 (1976) 48

ch. 85, § 35, 41 Stat. 450 47

MONT. CODE ANN. (1979):

§ 15-6-132 10

§ 15-6-138(b) 10

§ 15-30-112 12

§ 15-30-114 12

§ 15-30-122 12

§ 15-30-142 12

§§ 15-31-101 *et seq.* 10

§§ 15-35-101 *et seq.* 4

§ 15-35-101 30

§ 15-35-101(1)(e) 10, 47, 48

§ 15-35-102 7

§ 15-38-104 10

§ 82-4-338 10

MONT. CONST.:

art. IX, § 5 11

1979 Mont. Laws, ch. 698 12

PAGE

Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. (Supp. III 1979) §§ 3301 *et seq.* 5

Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.* 5, 37,

§102(b)(3), 92 Stat. 3291, 42 U.S.C. (Supp. III 1979) §8301 (b)(3)..... 37

§201, 92 Stat. 3298, 42 U.S.C. (Supp III 1979) §8311.....37, 44

§301, 92 Stat. 3305-6, 42 U.S.C. (Supp. III 1979) §8341.....37,44

28 U.S.C. § 1257(2) (1976) 4

U.S. CONST.:

art. I, § 8, cl. 3 4

art. VI, cl. 2 ..... 4, 36

WYO. STAT. (1977 and Supp. 1980):

§ 39-2-202..... 9

§ 39-2-402..... 9

§ 39-6-302(a)-(f)..... 9

§ 39-6-303(a)..... 9

Legislative History

53 Cong. Rec. 980-81 (1916) (remarks of Rep. Taylor—Colo.)..... 46

58 Cong. Rec. 7646 (1919) (remarks of Rep. Mondell) 48

PAGE

H.R. Rep. No. 95-496 (Part IV), 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8454 37

H.R. Rep. No. 294, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077-1577 39

H.R. Rep. No. 17 (Part 1), 64th Cong., 1st Sess. 3 (1916) 46

H.R. Rep. No. 17 (Part 2), 64th Cong., 1st Sess. 8 (1916) (minority views) 46

H.R. Rep. No. 668 (Part 2), 63d Cong., 2d Sess. 6 (1914) (minority views) 46

Remarks of Douglas M. Costle, Administrator of the Environmental Protection Agency, [1978] U.S. Code Cong. & Ad. News 8232 37

S. Rep. No. 95-361, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173 ... 37

Other Authorities

Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L.J. 219 (1957) 23

Bureau of Land Management of the Department of Interior, *Final Environmental Statement, Federal Coal Management Program* (April 1979) 39

T.O. Cohea, *Coal Board Grants* (January 11, 1978) 11

Developments in the Law: Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953 (1962) 23

PAGE

Environmental Protection Agency, *Tables Relating to New Standards for New Coal-Fired Power Plants* (May 25, 1979) 39

R. Givens, *Chief Justice Stone and the Developing Functions of Judicial Review*, 47 U. Va. L. Rev. 1321 (1961) 33

W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245 (1979) 23, 33

James R. Schlesinger, Remarks before 61st Anniversary Convention of the National Coal Association (June 6, 1978) (unpublished Department of Energy Release) 36

National Energy Plan II (May 7, 1979) 36

Kalispell Representative Says Coal Tax Too Low, The Missoulian, January 11, 1975 6

Posner, *Economic Analysis of the Law* (2d ed. 1977) 23

President Carter, Statement on Signing National Energy Bills (November 9, 1978), *reprinted in Weekly Compilation of Presidential Documents*: Vol. 14, No. 45 36

Rand Corporation, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report* (August 1976) 5

Robinson, Office of the Montana Legislative Fiscal Analyst, *Coal Impact and Coal Board Grants* (September 20, 1977) 11

C. Sands, *Sutherland Statutory Construction* (4th ed. 1972-73) 38, 48

PAGE

Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 Harv. L. Rev. 645 and 883 (1946) 19

Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. (1977) 11

Tribe, *American Constitutional Law* (1978) 32

Towe, *Explanation of Reasons for Montana's Coal Tax* 34

U.S. Department of Energy, *Energy Supply and Demand in the Midterm: 1985, 1990, and 1995* (April 1979) 39

DECISION OF THE COURT BELOW

The decision of the Supreme Court of the State of Montana, dated July 17, 1980, is reported at 615 P.2d 847. It is also reprinted in the Appendix to the Jurisdictional Statement at pages 1a-40a.*

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of the State of Montana upholding the dismissal of Complaints challenging the constitutionality of the Montana Coal Severance Tax. *See* MONT. CODE ANN. §§ 15-35-101 *et seq.* (1979). Judgment was deemed to have been entered on July 17, 1980, when the decision of the court below was docketed by the Clerk of the Supreme Court of the State of Montana. Notices of Appeal were filed with the Clerk of that court on October 2 and 6, 1980. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257 (2) (1976). Probable jurisdiction was noted at 49 U.S.L.W. 3428 (December 9, 1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case raises questions concerning the validity of the Montana Coal Severance Tax under the Commerce and Supremacy Clauses of the United States Constitution, art. I, § 8, cl. 3 and art. VI, cl. 2, respectively, and many federal statutes encouraging, mandating or regulating the

---

* "Apdx." refers to the Appendix to the Jurisdictional Statement. "J.A." refers to the Joint Appendix.

use of coal.* The text of these authorities, insofar as presently pertinent, is set out in the Appendix to appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

In 1975, at the height of the energy crisis, Montana increased its severance tax on coal to an unprecedented 30%. This case thus involves an attempt by one state, having an abundant supply of a vital natural resource—here low sulphur coal—to exact a tribute from the inhabitants of her energy-poor sister states. Montana's policy has been described as one of "OPEC-like revenue maximization", having no relationship to any legitimate needs of the state.** As noted by one of its principal sponsors, "[i]n the energy crunch today, Montanans should remem-

---

* *E.g.*, Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, as amended, 42 U.S.C. (Supp. III 1979) §§ 7401 *et seq.*; Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. §§ 6201 *et seq.* (1976 & Supp. III 1979); Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233; Energy Research and Development Administration Act (Authorizations and Appropriations for 1977), Pub. L. No. 95-39, 91 Stat. 130; Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, 15 U.S.C. §§ 791 *et seq.* (1976 & Supp. III 1979); Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083; Federal Non-Nuclear Energy Research and Development Act of 1974, Pub. L. No. 95-577, 88 Stat. 1878, 42 U.S.C. §§ 5901 *et seq.* (1976 & Supp. III 1979); Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437; Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. (Supp. III 1979) §§ 3301 *et seq.*; Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.*

** Rand Corporation, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report* 148 (August 1976).

ber that the Arabs have the oil but Montana has the coal. . . ."*

Montana does not own any significant portion of this coal. Indeed, three-quarters of the coal in Montana belongs to the federal government. Most of the remainder is privately owned. What Montana here seeks to do is to force the rest of the country to pay Montana an excessive tax for the use of a vital natural resource fortuitously located within its borders. While the tax is a severance tax in form, it is in fact an export duty, since virtually all of the coal subject to the tax is destined for interstate shipment under long-term contracts which provide, in effect, that the tax will be passed along to ultimate consumers in other states.

Appellants have conceded from the outset that the severance of natural resources within a state is an appropriate subject of that state's taxation. They assert, however, that this state power is ultimately limited by both the Commerce Clause and the Supremacy Clause, and that the tax in question here must be struck down because it imposes an undue burden on interstate commerce and substantially frustrates the achievement of vital federal policies.

Montana and its courts have taken the position that the Constitution imposes no such limits on the power of that state to impose such taxes. According to Montana, a tax equal to 100%, or even 1,000% or 2,000%, of the value of the coal may be imposed, and neither the Commerce

---

* Representative Ora Halvorson of Kalispell, Montana, Vice Chairman of the Montana House Taxation Committee, quoted in *Kalispell Representative Says Coal Tax Too Low*, The Missoulian, January 11, 1975.

Clause nor the Supremacy Clause can be invoked to prevent it.

This case thus presents fundamental constitutional questions of the state's power to impose taxes in a factual context of extreme importance. If ultimately upheld, Montana's Coal Severance Tax foreshadows a trend in state taxation of energy resources which can only lead to the Balkanization of this nation in the same way that OPEC's efforts have fragmented the world economy. The far-reaching question presented by this appeal is whether the United States Constitution limits the power of energy-rich states to exact unlimited tribute in the form of taxes from the rest of the country, where there is no legitimate need for such taxes and the taxes, themselves, may have adverse effects on interstate commerce and on national policies designed to meet the energy needs of the nation. The view of state power advanced by the court below seriously jeopardizes the concept of a national free trade area, the creation of which was the central purpose of the Commerce Clause.

Statement of Facts

In 1975, in response to increased demand for low sulphur coal generated largely by the Clean Air Act of 1970, and in the aftermath of the 1973 Arab oil embargo, Montana increased its severance tax on coal to unprecedented levels. As a result, substantially all of the coal now mined in the state is taxed at 30% of value.* This is, by far, the highest rate in the nation. Coal taxed at the rate

---

* Value is defined as the "contract sales price," *i.e.*, the price of coal after being extracted and prepared for shipment f.o.b. mine, less production taxes. MONT. CODE ANN. § 15-35-102 (1979).

of 34 cents per ton prior to the 1975 amendment is now typically taxed at the rate of $2.08 per ton, with some taxpayers presently paying as much as $4.63 per ton. On a percentage basis, the increases from 1975 to date thus amount to from 500% to 1,250%.

It is clear that the tax has a substantial effect on interstate commerce and was always intended to do so. As the Montana legislature well knew at the time this tax was passed, the great bulk of coal mined in Montana is immediately shipped out of state pursuant to long-term coal purchase agreements which provide that the costs of taxation will be passed along to the consuming utilities. (Complaint ¶ 17; Apdx. 53a). These utilities, in turn, adjust the price of electricity to their customers to reflect increased fuel costs. In 1979, such out-of-state shipments aggregated 28 million tons of coal, accounting for at least 90% of the value of Montana's entire production. Plaintiffs paid severance taxes of about $60 million on these shipments. Under the terms of existing contracts, they estimate that the amount payable over the next two decades will reach several billion dollars.

The fact that the tax would ultimately be borne by consumers in other states loomed large in its adoption. While the technical incidence of the tax is on the coal producing plaintiffs in Montana, selection of coal as the object of this extraordinary tax permitted the Montana legislature to export the practical effect of the tax to consumers in other states who are unable to vote in Montana. For reasons such as these, the tax has enjoyed unparalleled popularity within Montana. Since its passage, there has been no substantial opposition to it.

It is equally clear that the tax will have a substantial adverse effect on the many efforts of Congress to shift

this nation's energy reliance away from foreign petroleum products and toward increased reliance upon coal. The vast resources of coal found in the western United States—much of it owned by the federal government—are a cornerstone of these vital policies. The excessive costs imposed by this tax manifestly tend to frustrate the central purpose of the many statutes designed to encourage or mandate the use of coal.*

Montana finds itself able to exact taxes of this magnitude because of its unique position with respect to coal. One-quarter of our entire national reserves, and over one-half of our national reserves of low sulphur coal, are located in Montana. Montana and Wyoming together contain 40% of this nation's coal and 68% of its low sulphur reserves.** But this is not to say that the coal "belongs" to Montana and Wyoming or comprises their exclusive "birthright". To the contrary, fully three-quarters of these reserves have historically belonged to the federal government and still belong to it.

Uninhibited by the sort of constituent pressure which typically restrains excessive taxes, the Montana legislature set the rate of the tax with an eye toward revenue-maximization, in the mold of the OPEC nations, without regard for any legitimate need. In fact, legislative findings preceding the Montana statute clearly emphasize the intent to appropriate most of the difference between the

---

* In this connection, the State of Texas appeared as *amicus* in the court below in favor of plaintiffs. Texas and a number of other states have already filed *amicus* briefs here, as well. Their representations to this effect are compelling.

** Wyoming and its subdivisions impose severance taxes which amount, in the aggregate, to approximately 17%. *See* WYO. STAT. §§ 39-2-202, 39-2-402, 39-6-302(a)-(f), 39-6-303(a) (1977 and Supp. 1980).

market price and the cost of production (including a reasonable profit),* rather than to meet the needs of the state. *See* MONT. CODE ANN. § 15-35-101(1)(e) (1979); Apdx. 62a-63a. When it adopted the severance tax in its 1974 and 1975 sessions, the legislature bypassed the usual biennial budgeting process, in which needs are typically balanced against revenues.

In this instance, the Montana legislature embarked on an approach to state taxation which closely resembles the approach taken by the OPEC nations and certain oil-rich Canadian provinces. Montana went well beyond any concept of its needs—looking instead to exploit the windfall which might be available because of the existing energy crisis—at the expense of its sister states.

Because the case was disposed of below on a motion to dismiss, plaintiffs have never had an opportunity to make a full factual record on this issue. Certain facts nevertheless show that the disparity between needs and revenues is great.

1. Even without a severance tax, the costs of coal mining which impact on the State of Montana would be covered by other taxes** and by federal revenue programs

---

* This is referred to in the statute as the "economic rents."

** The State of Montana and its local subdivisions impose a number of taxes on the mining of coal. For example, a resource indemnity trust tax (MONT. CODE ANN. § 15-38-104 (1979)); a gross proceeds tax (§ 15-6-132); a property tax on mining equipment (§ 15-6-138(b)); and a corporate license tax (§ 15-31-101, *et seq.*).

Moreover, all costs of reclamation must be borne by the coal companies. In this regard, the state requires each company to purchase a reclamation bond prior to the commencement of any mining operation in order to ensure that the land will be adequately reclaimed. MONT. CODE ANN. § 82-4-338 (1979).

which predated the severance tax.* Thomas L. Judge, then Governor of Montana, has testified that the state's share of the federal royalties alone was sufficient to cover all of the state's impact costs.** If any further confirmation of this is necessary, it need only be noted that since December 31, 1979, fully 50% of the entire severance tax revenues have been deposited into a constitutional trust fund for future generations which may not be used except upon a three-quarters vote of both houses of future legislatures. MONT. CONST. art. IX, § 5.

2. Experience now shows that legitimate needs have already been met. This is confirmed by studies done by the state, itself,*** and by the plaintiffs here. Moreover, property tax rates in affected communities have been reduced, not raised, since the onset of large-scale coal mining, and the state, itself, has adopted general tax relief

---

* As noted, roughly 75% of the coal in Montana is actually owned by the federal government. Under the Mineral Lands Leasing Act of 1920, as amended, Montana is entitled to a direct rebate of 50% of all federal royalties on mineral leases within its borders; additionally, the federal government must use an additional 40% of such royalty revenues on reclamation projects in the affected states. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2770 (§ 317) (codified at 30 U.S.C. § 191 (1976)).

** *Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess. 629 (1977).

*** T.O. Cohea, *Coal Board Grants* 15 (January 11, 1978); Robinson, Office of the Montana Legislative Fiscal Analyst, *Coal Impact and Coal Board Grants* 25-26 (September 20, 1977). Indeed, the Coal Board has had a difficult time finding ways to spend all of the severance tax revenues available, and has approved grants for projects which are either well outside the coal-impacted areas or otherwise completely unrelated to impact costs imposed on the state by coal mining. *Id.*

measures for its own citizens which were made possible because of excessive severance tax revenues.*

In fact, while much has been made in public discussions of the need for public funds for "boomtowns," reclamation and other legitimate costs, defendants have admitted for purposes of the motion to dismiss that the tax is not fairly related to the services and protections provided by the state. (Complaint ¶ 26; Apdx. 55a). In support of this allegation, plaintiffs expected to show through a comprehensive economic study they conducted that the legitimate local impact costs—for schools, roads, police, fire and health protection, and environmental protection and the like—might amount to approximately 2¢ per ton, compared to present average revenues from the severance tax alone of over $2.00 per ton.

In sum, if they had had an opportunity for a trial plaintiffs would have introduced evidence which would have demonstrated that revenues expected from this tax were grossly disproportionate to the services and protections provided by the state, however those services and protections may be measured.

The Proceedings Below

In their Complaints, filed in June, 1978, plaintiffs sought a refund of over $5.4 million in taxes paid under protest, a declaration that the tax was invalid under the Commerce and Supremacy Clauses of the United States

---

* *E.g.*, 1979 Montana Laws, ch. 698; MONT. CODE ANN. §§ 15-30-112, 15-30-114, 15-30-122, 15-30-142 (1979).

Constitution, and an injunction against its further collection.* (Complaint; Apdx. 45a-61a). Defendants moved to dismiss all of the claims for failure to state claims upon which relief could be granted, and the Montana trial court granted defendants' motion. (J.A. 30a-87a).

On appeal, the Montana Supreme Court passed on these claims as follows:

1. The Montana Supreme Court rejected the contention that the tax constitutes an undue burden on interstate commerce (Complaint ¶¶ 26, 27; Apdx. 55a), finding "that the severance of coal here is a taxable event that precedes entry into interstate commerce" and is "not an interstate activity" and that, in such circumstances, the Commerce Clause imposes no limit on the power of the states to tax. (Opinion 15; Apdx. 18a).

In an alternative holding, the Montana Supreme Court also found as a matter of law that the Montana tax meets the "fairly-related" prong of the four-prong test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), holding that the test was met in all cases where the state provided the benefits of a civilized society. (Opinion 19; Apdx. 22a-23a).

2. In Count Two, plaintiffs asserted that the Coal Severance Tax substantially frustrates national policies reflected in a variety of federal statutes intended to

---

* In each quarter since then, plaintiffs have filed additional Complaints seeking a refund of successive quarterly tax payments. Additionally, Western Energy Company has filed separate Complaints. In the aggregate, the total amount now in issue exceeds $135 million.

encourage the use of coal, and particularly western low-sulphur coal, to meet national energy requirements. (Complaint ¶¶ 30-32; Apdx. 55a-56a). The decision of the Montana Supreme Court denied there was any such policy or, alternatively, that existing policy favored eastern and midwestern coal. It further held, in effect, that a tax could not be preempted unless it was expressly or by necessary implication shown to be prohibited by federal law.

3. In Count Three, plaintiffs asserted that the Coal Severance Tax also substantially frustrates the national policy reflected in the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, to effect a compromise which channels the revenues from federally-owned minerals to the federal government in the first instance, subject to later division with the states in a fixed proportion. (Complaint ¶¶ 34-44; Apdx. 56a-59a). The court below rejected this interpretation on the basis of a proviso in the Act which permitted state taxation of such minerals. (Opinion 33; Apdx. 38a-39a).

SUMMARY OF ARGUMENT

Count One

In reaching its decision, the Supreme Court of Montana relied on a series of decisions from the 1920's dealing with state taxation of the extraction of mineral resources, especially *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Under a broad reading of those older cases, activities not "in" interstate commerce were a matter of exclusive state concern which could not be reached by the Commerce Clause.

As even the Supreme Court of Montana recognized, the rationale of *Heisler* and like cases has been expressly rejected by this Court in the last forty years in a wide variety of contexts. (Opinion 8-10; Apdx. 10a-11a). A new and more practical test has been adopted, looking to the substantial effects on commerce of a particular tax or regulation. However, the Montana court rejected application of this modern test as mere *dicta*, and found it inapplicable here. (Opinion 10-11; Apdx. 12a-13a). Instead, the court reaffirmed the continuing validity of *Heisler*, although its rationale has surely long since been discredited.

Under modern Commerce Clause tests which apply here, state taxes which substantially affect interstate commerce may be held invalid if they are not fairly related to the services and benefits provided by the state to the taxpayer, or if they discriminate against interstate commerce. *See, e.g., Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). Appellants have alleged that the present tax fails to pass muster on both of these counts. They should not have been denied the opportunity to prove their case.

Count Two

The Montana tax also raises substantial issues under the Supremacy Clause. The Complaints allege the existence of a national policy to encourage the use and production of coal generally, and of low sulphur western coal in particular, to meet the nation's energy needs. (Complaint ¶¶ 30-31; Apdx. 55a-56a). The Complaints further assert that the excessive Montana tax substantially frustrates those purposes. (Complaint ¶ 32; Apdx. 56a).

The Montana courts rejected these claims as a matter of law, without the benefit of a trial, and in doing so

seriously misperceived both the applicable legal standard and the basic thrust of the federal policy. Thus, the court below denied the existence of a national policy to encourage the production of western low sulphur coal, and also incorrectly held that a state tax statute may not be preempted unless Congress expressly stated an intention to do so. Under prevailing rules, however, state statutes may be struck down where they "substantially frustrate" the purposes and objectives of Congress, whether or not Congress has expressly declared its intention to prohibit the state action. *E.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977); *Hill* v. *Florida*, 325 U.S. 538, 542 (1945). Plaintiffs should have been given an opportunity to establish both the existence of the national policies and their frustration by the Montana Coal Severance Tax.

Count Three

Congress has also enacted statutes concerning the use and disposition of western coal deposits, and of the financial benefit flowing from such disposition. Some 75% of the coal in Montana belongs to the federal government. As a result of compromises embodied in the Mineral Lands Leasing Act of 1920, as amended, these deposits were reserved to the federal government. Pursuant to the Act, the coal was to be leased to private interests and the revenues from those leases were to be divided, by statute, in fixed proportions between the federal government and the states. By enacting a severance tax designed to absorb all of the economic rents from those deposits, Montana has substantially frustrated the central purpose of that Act. Thus, under the prevailing preemption principles established by the Court, plaintiffs should have been allowed to prove that the tax is invalid under the Supremacy Clause.

ARGUMENT

I. A STATE TAX ON AN ACTIVITY WHICH "SUBSTANTIALLY AFFECTS" INTERSTATE COMMERCE, WHETHER OR NOT "IN" INTERSTATE COMMERCE, IS NOT IMMUNE FROM SCRUTINY UNDER AN APPROPRIATE COMMERCE CLAUSE TEST

The Montana Supreme Court arrived at its result principally in reliance on the *Heisler* line of cases. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Gas Co.* v. *Hall*, 274 U.S. 284 (1927). Under those decisions, an activity not "in" commerce was said to be wholly beyond the reach of the Commerce Clause. From this, the court below derived the conclusion that a state severance tax falls on an activity which "precedes entry into interstate commerce." (Opinion 15; Apdx. 18a). As a result, it concluded that such a tax, whatever its amount, is a matter exclusively of state concern and cannot, in any circumstances, be reached by the Commerce Clause. (Opinion 15; Apdx. 18a-19a).

Under the broad rationale of the *Heisler* line of cases—adopted and applied here by the Montana Supreme Court—all Commerce Clause questions could be decided by a "mechanical test." The test was expressed most clearly in the Court's decision in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). There, the majority derived the following rule from *Heisler*, *Oliver Iron* and other like cases (page 303):

> One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce,

> whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government.

This mechanical test—the rule before 1937—is, we submit, utterly inconsistent with constitutional doctrines adopted since that time which clearly recognize the Commerce Clause implications of acts which "substantially affect" interstate commerce, whether they are "in" or "out" of such commerce. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), clearly broke with the *Heisler* test. It held (page 37):

> Although activities may be in*tra*state in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. (Emphasis supplied).

Wickard v. *Filburn*, 317 U.S. 111 (1942), underscored the departure from the earlier rule, extending the commerce power to those "activities in*tra*state which so affect interstate commerce . . . as to make regulation of them appropriate. . . ." *Id.* at 124, *quoting United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). (Emphasis supplied). It made specific reference to *Heisler* and related cases as "earlier pronouncements," and made clear that such cases no longer accurately reflected the law, even in 1942. *Id.* at 122, n. 21.

Since that time, this Court has consistently held in a variety of ways and contexts that activities which "substantially affect" interstate commerce raise similar Commerce Clause concerns as those activities which are "in" interstate commerce under the older rules. *E.g.*, *McLain* v. *Real Estate Board*, 444 U.S. 232, 241 (1980); *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979); *Katzenbach* v. *McClung*, 379 U.S. 294, 301-304 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964).

The first cases applying the newer rule dealt specifically with the power of Congress, but the Commerce Clause principles they announced have by no means been confined to that context. Instead, these new principles represented a fundamental change in the Court's view of the Commerce Clause derived from the proposition that the older, mechanical view of the relationships between the states and the federal government could no longer serve the needs of our complex society and a modern national economy. *See generally* Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 Harv. L. Rev. 645 and 883, 845-47 (1946).

As the Court has recently reiterated, the principles for determining the sweep and scope of the Commerce Clause apply equally to its "negative implications"—*i.e.*, its restraints on the power of the states—as to its affirmative grant of power to Congress. *E.g.*, *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2015-17 (1980); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622-23 (1978). A state's tax or regulation is no longer immunized from Commerce Clause scrutiny by a claim that it only attaches to a "local" or in*tra*state activity. *E.g.*, *Hunt* v. *Washington Apple Advertising Commission,* 432 U.S. 333, 350

(1977); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970); *Nippert* v. *City of Richmond*, 327 U.S. 416, 423-24 (1946). *See also Parker* v. *Brown*, 317 U.S. 341, 362 (1943).

The modern view is pervasive. We are not aware of any case decided by this Court in recent times—and appellees have not cited any—which supports the view that a state tax which substantially affects interstate commerce is immune from scrutiny under the Clause.*

The Montana Supreme Court did not dispute—and, in fact, tacitly conceded—that this Court's opinions over the years since 1937 have consistently rejected mechanical tests such as that employed in *Heisler* in favor of Commerce Clause tests looking to the practical "substantial effects" of particular activities on commerce. (Opinion 9-10; Apdx. 11a-12a). It nevertheless brushed these cases aside, holding that their rationale had not yet been extended to the precise question of a state's power to tax natural resources and that it did not consider itself bound

---

* Two cases have been cited by appellees for the proposition that "cases like *Heisler* have lost none of their controlling force." (Motion 10-11). *See Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 541 (1969); *Alaska* v. *Arctic Maid*, 366 U.S. 199, 203-04 (1961). Both of these decisions stop well short of supporting the conclusion appellees assert in the context of this case. In both cases, a taxpayer argued that an activity in which it was engaged was immune from state tax because it was "in" interstate commerce. Both cases held that the activity was not "immunized" from a state tax simply because a natural resource, once extracted, was to be immediately shipped out of the state for processing and sale.

Plaintiffs have no quarrel with that conclusion, since it simply establishes the power of the state to tax. But it is a conclusion which is essentially irrelevant to the proposition for which Montana cites the cases and which is equally irrelevant to the issues here. The issue in this case is not whether the activity is immune from tax, but whether the tax, itself, is immune from scrutiny under the Commerce Clause.

by "dicta" in other cases decided by this Court. (Opinion 10-11; Apdx. 12a-13a).

This reasoning should be rejected for the following reasons:

1. The *Heisler* decision is not based on any rationale peculiarly applicable to state taxation. Instead, it was based upon the then-prevalent restrictive reading of the Commerce Clause, motivated by a concern that a broader application would (260 U.S. at 259-60):

> nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet "on the hoof," wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.

But, of course, that restricted view of the scope of the Commerce Clause has been outmoded for over 40 years.* The "fruits of California" and "the wheat of the West" are now most certainly subject to the Commerce Clause. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). With the disappearance of the rationale for that view, any sensible argument for continued application of the cases based upon it also

---

* Except in the State of Montana, whose Supreme Court persists in the startling view that taxes on the production of coal are "ahead of and preliminary to the sweep of the power of Congress to regulate commerce". (Opinion 22; Apdx. 25a). *Compare Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979). Even appellees acknowledge that Congress' power goes this far. (Motion 19-20).

vanished. The court below offered no reason why the rationale of *Heisler*, which has been totally discredited and rejected in every other context for more than 40 years, should nevertheless survive and be applied in a context involving state taxation of natural resources. No reason appears why such a distinction should be drawn other than the parochial desire to sustain this tax. Indeed, it would require a repudiation of over 40 years of Commerce Clause history for this Court to now accept *Heisler* and its rationale as controlling here.

2. The Montana court's reasoning also contravenes at least one case, virtually ignored by the Montana court, which expressly applied the modern rule to the question whether the states and their subdivisions have unfettered power to impose taxes which have a substantial economic effect on interstate commerce when the tax itself is imposed on an act which can be labeled a "local incident." *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946). In that case, the City of Richmond asserted that its tax on the solicitation of sales within the city was immune from scrutiny under the Commerce Clause. This Court rejected that claim, observing that (pages 423-24):

> there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local," and thus achieve its desired result.
>
> * * * * *
>
> [W]hether or not a "local incident" related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the *substantial effects, actual or potential*, of the particular tax in suppressing or burdening unduly the commerce. (Emphasis supplied).

3. Distinctions such as those employed by the court below are, in the end, artificial and unsatisfactory, and have long been recognized as such.* They should be rejected for that reason as well.

Consistent with the repudiation of *Heisler,* this Court has enunciated a series of principles relating to the power of states to tax activities which are in or affect interstate commerce. This effort has been "an endeavor to establish a consistent and rational method of inquiry" which focuses on "the practical effect of a challenged tax." *See Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980), and cases there cited. This principle should be applied here.

The Montana Supreme Court relied heavily on its conclusion that the "severance of coal . . . precedes entry into interstate commerce." (Opinion 15; Apdx. 18a). As we have shown above, the court below should have examined the practical effects of the tax rather than determining the case by this sort of delineation.**

---

* *See* W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 248 (1979); *Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 970-71 (1962); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 232-33 (1957); Posner, *Economic Analysis of the Law*, 510, 513-14 (2d ed. 1977). As all of these authorities show, severance taxes are functionally indistinguishable from other forms of taxation clearly subject to the Commerce Clause. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

** Even if one accepts, for purposes of argument, the reasoning that there must be a precise point at which coal "enters" interstate commerce, nothing in logic commends selection of a point following severance for drawing this line. It would be equally logical to say that coal starts its interstate journey at the very moment of severance since, as soon as the coal is severed, it is picked up, cleaned, crushed and delivered to a rail siding for loading onto rail cars and delivery to its final destination in a continuous interstate movement. The selection of *any* point along this continuum to determine constitutional rules is a fundamentally artificial exercise in line-drawing.

There is no point in the continuous process of taking coal from a mine and delivering it for use at which it is necessary or appropriate to prohibit state taxation absolutely, even assuming that the process has become interstate commerce. *See Complete Auto Transit Co., Inc.* v. *Brady*, 430 U.S. 274 (1977). Correspondingly, there is no point at which the state's power to tax activities which substantially impact on that continuous process should be entirely free of review concerning its Commerce Clause implications. At each point along the entire continuum, the issue should be posed as one of balancing and of degree. Any other rule would return us to the antediluvian concepts last expressed here over forty years ago in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 303 (1936).

4. Finally, the result announced by the court below foreshadows grave practical consequences for this nation. It can only lead to serious division between those states which have access to energy resources and those which do not. In essence, the Montana Supreme Court held that the Commerce Clause imposes no limit whatsoever on the power of the individual states to extract taxes based on the severance of energy resources. This position came into vivid focus when defendants conceded that it would make no difference to their analysis of the case if the tax were not 30%, but were raised to 1,000% or 2,000%. This contention was tacitly accepted by the court below and inevitably follows from its decision. Thus, in its view, the only limitation on the rate of a state's tax substantially affecting commerce is that set by the state's legislature. (Opinion 18; Apdx. 22a). This is a dangerously divisive view.

The availability of energy resources, and the price which they command, is one of the most compelling

issues of our time. Armed with unfettered power and freed from constitutional restraint,* the self-interests of energy-rich states must come into conflict with those which lack such resources, and with the national interest in energy use and sufficiency. Any constitutional rule which permits states to adopt "OPEC-like revenue maximization" policies clearly cuts across the balance between state and federal power lying at the heart of the Commerce Clause and exposes the nation to Balkanization. It offends the basic premise that this nation constitutes a nationwide free trade area in which one state is not permitted to throw up undue trade barriers at the expense of its sister states. *See, e.g., H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 538-39 (1949).

Montana's tax is a prime example of the abuses which may flow from any rule which leaves the states with unfettered power to tax. It was designed to shift billions of dollars to Montana directly from the citizens of other states by the end of the century, and to use a substantial

---

* In *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.) (*en banc*), *cert. granted*, 101 S. Ct. 71 (1980), the Tenth Circuit apparently ascribed equivalent powers to an Indian tribe. One of the appellants in this action, Westmoreland Resources, Inc., is particularly affected by that decision. Westmoreland mines coal in Montana owned by the Crow Tribe. In addition to the 30% severance tax imposed by Montana and substantial royalties payable to the Crow Tribe, the Tribe has attempted to impose an additional 25% severance tax on the coal mined by Westmoreland.

Both Montana and Westmoreland are involved in other proceedings with the Crow Tribe relating to the Montana tax. *Crow Tribe of Indians* v. *State of Montana*, 469 F. Supp. 154 (D. Mont. 1979), *appeal pending*, (9th Cir., No. 79-4321). Westmoreland simply notes here that any standard which permits application of a 30% *and* a 25% tax on the same activity—where neither amount bears any fair relation to benefits bestowed—must necessarily be viewed as an excessive burden on commerce.

part of those billions to create a multi-billion trust fund for future Montana citizens. It is well on its way to achieving that goal.

Continuance of this tax can only lead to the recrimination and retaliation among the states which was the immediate concern of the Founding Fathers when they wrote the Commerce Clause 194 years ago. As Madison stated, the principal reason leading to the adoption of the Constitution was that:

> 'want of a general power over Commerce led to an exercise of this power separately by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.' 3 Farrand, Records of the Federal Convention, 547.

H.P. Hood & Sons, Inc. v. *Du Mond*, *supra*, 336 U.S. at 534.

* * * * *

For the foregoing reasons, we respectfully submit that this Court should hold that a state does not have unlimited power to tax an activity, such as the mining of coal, which "substantially affects" interstate commerce, and that such taxes are subject to scrutiny under an appropriate Commerce Clause test. Such a holding would conform to the uniform decisions of this Court on related issues over the past forty years and would be in accord with both practical reality and the needs of the nation.

II. THE APPROPRIATE COMMERCE CLAUSE TEST HERE REQUIRES A FACTUAL DETERMINATION WHETHER THE TAX IS FAIRLY RELATED TO BENEFITS PROVIDED BY THE STATE AND WHETHER IT DISCRIMINATES AGAINST INTERSTATE COMMERCE

If ever there were a tax deliberately designed to impose an unreasonable burden on non-residents of the taxing jurisdiction, this tax is it. This fact brings into sharp focus what this Court said in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 n.15 (1977):

> Any tailored tax . . . creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. See *Freeman* v. *Hewit*, 329 U.S., at 265-266, n. 13 (concurring opinion). *A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce.* (Emphasis supplied).

Here, the burden of the tax "is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 46 n.2 (1940).* In such circumstances, where the political process may fail to work, courts generally—and this Court in particular—have a special burden to apply rigorous standards of review.

---

* The conclusion of the Montana Supreme Court that an adequate political check exists (Opinion 22; Apdx. 26a)—based on "judicial notice" of the number of coal industry lobbyists, rather than any factual record in this case—is simply in error. The best evidence of the relative political effectiveness of these lobbyists in the Montana legislature is the current 30% rate of the tax.

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429, 446-47 (1978); *Austin* v. *New Hampshire*, 420 U.S. 656, 662-63 (1975).

Recognizing the dangers of a tailored tax, this Court has articulated a well-defined, four-pronged factual test to determine the constitutional validity of state taxes which affect interstate commerce. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). That test has been reiterated not less than four times in the past three years. *Exxon Corp.* v. *Wisconsin Department of Revenue*, 100 S. Ct. 2109, 2122 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 444-45 (1979); *Washington Revenue Department* v. *Stevedoring Association*, 435 U.S. 734, 750 (1978). *See also National Geographic Society* v. *California Equalization Board*, 430 U.S. 551, 558 (1977).

As most recently articulated, that test requires the Court to examine:

> the "practical effect" of the tax to determine whether it " 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.' "

Exxon Corp. v. *Wisconsin Department of Revenue, supra,* 100 S. Ct. at 2122, *quoting Complete Auto Transit, Inc.* v. *Brady, supra*, 430 U.S. at 279.

The Montana Supreme Court readily assented to the expansion of state powers articulated in *Complete Auto* and like decisions (Opinion 13; Apdx. 15a-16a), but gave short shrift to these corresponding limitations. In addition to rejecting the claim that the Commerce Clause

applies to a state severance tax, it also reached erroneous conclusions concerning the appropriate construction of the "fairly related" prong of the pertinent Commerce Clause test. The construction given to the test by the court below emasculates the test and leaves the state with power to tax without limit.

A. Plaintiffs' Claim that the Tax is Not Fairly Related to Benefits and Services Provided by the State Should Not Have Been Dismissed Without a Trial

The court below held that the "fairly related" branch of the foregoing test may be determined as a matter of law, without any factual inquiry, holding that the test was satisfied simply because Montana provides governmental services and "the advantages of a civilized society" universally afforded by each of the fifty states. (Opinion 19; Apdx. 22a).* This disposition of the problem is much too facile. In the first instance, it fails to give the tax the "careful scrutiny" mandated by *Complete Auto* to determine whether it is, indeed, fairly related to the benefits allegedly bestowed and thus ignores this Court's concern with the dangers to interstate commerce of a tailored tax. In the absence of finding such a relationship, the tax stands exposed for what it is, a naked attempt to export the tax burdens of one state to the citizens of its sister states.

---

* The Montana Supreme Court also discarded the "fair relation" test in another way, holding that it did not come into force unless a tax violates another branch of the four-part test as well (*i.e.*, insufficient nexus or faulty apportionment). (Opinion 19; Apdx. 22a-23a). There is not the slightest indication in the opinions of this Court that the "fair relation" test does not require a separate and independent factual analysis of the relationship between the burdens of the tax and the benefits allegedly bestowed.

Furthermore, if the "advantages of a civilized society" satisfy the "fairly related" test repeatedly announced by this Court in recent years in Commerce Clause cases involving state taxes, the test has no real meaning, because it can be met by any state and under all circumstances. If the "fair relation" test is to have any meaning at all, it requires a factual determination to be made in appropriate cases.

If the test is ever to find application, this is the case. This tax bears no relationship at all to the legitimate needs of Montana. Contrary to the holding of the Montana court (Opinion 19; Apdx. 22a-23a), it is not "imposed for the general support of the government". It was enacted by a legislature which made no effort to balance costs and benefits, and instead focused its attention on revenue maximization. Reference to the Legislative Findings and Declarations of Purpose of the tax (MONT. CODE ANN. § 15-35-101 (1979); Apdx. 62a-63a) reveals an overriding intent to exploit the taxability of coal located in Montana, rather than an attempt to meet legitimate impact costs. Far from being used for support of the government, 50% of the massive tax revenues are presently cached away in a trust fund for future generations. Thus, if the absence of a "fair relation" could be shown as a factual matter in any case, it can be done here.

No case has yet come to this Court in which the absence of a "fair relation" has been squarely raised in a factual context.* The decisions of the Court nevertheless

---

* *Maryland* v. *Louisiana*, No. 83 Original (October 1979 Term), raises similar claims in its pleadings. In apparent recognition of the factual nature of this inquiry, the parties have initially pressed other issues which, they believe, are dispositive without the necessity of a trial.

clearly suggest that the test is not an empty one, subject to facile disposition. Instead, it is clear that a factual analysis is intended and required. *E.g.*, *Washington Revenue Department* v. *Stevedoring Association*, 435 U.S. 734, 750-51 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). Cases in lower courts so state. *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 545 n.4 (10th Cir.) (*en banc*), *cert. granted*, 101 S. Ct. 71 (1980); *Budget Rent-a-Car of Wash.* v. *Multnomah County*, 287 Or. 93, 597 P.2d 1232, 1239 (1979). Even the trial court in this case squarely held that, if it reached this question, it "would necessarily have to deny the motion to dismiss and proceed to a factual determination." (District Court Opinion 5; J.A. 37a). The contrary holding of the Supreme Court of Montana was simply error.*

Appellees also attack the institutional competence of the courts to apply the "fair relation" test to this and other taxes. (Motion 16). The courts are fully competent to apply such a test and it is vital that they do so here.

We do not contend that a "fair relationship" must be determined with dollar-for-dollar precision by either the legislature or the Court. What must be determined is whether a reasonable relationship exists. Unlike the ordinary case in which such questions might be closely contested, here the Montana legislature grossly overreached, without any study or consideration of the costs or benefits involved, thus making it unlikely that the matter will be in serious dispute if remanded for trial.

---

* *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), is not to the contrary. The language from that case on which appellees particularly rely (Motion 15) appears to be merely a restatement of one of the arguments advanced by a party in that case, not a holding of the Court.

Courts have frequently been called upon to apply comparable tests. On several occasions, this Court has determined whether specific state levies exacted more than their "fair share" in relation to the benefits or services provided by the state. *E.g.*, *Evansville Airport* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 598-600 (1939); *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U.S. 72, 77-78 (1939); *Ingels* v. *Morf*, 300 U.S. 290, 296-97 (1937). *See also Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 548 (1950).

The other branches of the four-pronged *Brady* test also provide examples of the competence of courts to apply such tests. Here, too, the states have wide latitude to fashion apportionment formulas but are nevertheless constrained by the outer limits of what is permissible under the Constitution. These outer limits are enforced by the courts. *See*, *e.g.*, *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 273-75 (1975); *Norfolk & W.R. Co.* v. *Tax Commission*, 390 U.S. 317, 326-27 (1968). This same judicial process should be applied here.

Such judicial restraints are particularly necessary in cases, such as this, in which the normal political restraints do not work to protect the vital interests of those who are unrepresented in the state legislature. *See* discussion at pages 27-29, *supra*. As Professor Tribe put the matter (*American Constitutional Law* 319 (1978)):

> Even judges and commentators ordinarily hesitant about federal judicial intervention into legislative choice tend to support a relatively active role for the federal judiciary when the centrifugal, isolating or hostile forces of localism are manifested in state legislation.

See also R. Givens, *Chief Justice Stone and the Developing Functions of Judicial Review*, 47 U. Va. L. Rev. 1321, 1345-46 (1961).

B. Plaintiffs' Claim That the Tax Discriminates Against Interstate Commerce Should Not Have Been Dismissed Without a Trial

The Montana Supreme Court nowhere expressly passed on plaintiffs' contentions that the tax was adopted because it would shift an extraordinary burden to other states and thereby discriminates against interstate commerce. Plaintiffs' theory of discrimination, however, has been accepted elsewhere as having "considerable force". W. Hellerstein, *Constitutional Restraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 249 (1979). It is based on a proposition which has long been clear—that a tax which is not discriminatory on its face may nevertheless discriminate in fact. *Nippert* v. *City of Richmond*, 327 U.S. 416, 431 (1946):

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance. . . .

See also Dayton Power & Light Co. v. *Lindley*, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979) (Ohio coal tax, although seemingly neutral on its face, invalidated on Commerce Clause grounds because it discriminated in practice against non-Ohio coal).

The history of the Montana tax makes it abundantly clear that one of its primary purposes was to shift the tax burden of Montana to the citizens of other states. The

principal sponsor of the tax prepared a memorandum to the legislature which makes this point explicit. Towe, *Explanation of Reasons for Montana's Coal Tax* 4:

> Most of Montana's coal is shipped out of state to power plants and utility companies in the Midwest. In reviewing the [long-term] contracts between the coal companies and the utility companies who purchase the coal, all of the contracts that were shown to our Legislative Committee contain an escalation clause for taxes. In other words, the local companies simply add the additional taxes to their bill, and the entire cost is passed on to the purchasers in the Midwest or elsewhere. Because most of the purchasers are regulated utility companies, it is reasonable to assume these companies will, in turn, pass on their extra costs to their customers.

This prognosis has proved correct. Because of contracts which shift the effects of the tax primarily to non-Montana utility companies and thus directly to citizens of other states, over 90% of the tax burden falls directly on non-Montanans. In Montana, it is understandably a very popular tax. In light of these facts, it is manifest that the tax was "tailored" to fall on interstate commerce and on out-of-state residents. Plaintiffs should have been allowed to make the appropriate factual showing of discrimination.

III. THE TAX SUBSTANTIALLY FRUSTRATES NATIONAL POLICIES WITH RESPECT TO THE PRODUCTION AND USE OF COAL AND SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE

A. National Energy Policy, as Reflected in Federal Statutes and Regulations, Favors the Increased Production of Coal Generally and of Low Sulphur, Western Coal in Particular

In the courts below, plaintiffs asserted that there was a national policy favoring the production and use of coal, and particularly low sulphur western coal, over alternate forms of energy. (Complaint ¶¶ 30-31; Apdx. 55a-56a). Plaintiffs further alleged that the Montana Coal Severance Tax stood as an obstacle to and substantially frustrated these national policies. (Complaint ¶ 32; Apdx. 56a).

The Supreme Court of Montana also had difficulty in dealing with this issue. In the course of its opinion it found, variously, that (a) "no national policy can be discerned as a matter of law" (Opinion 29-30; Apdx. 34a-35a); (b) that there was a national policy which favored the production and use of coal, but not of low sulphur western coal (Opinion 29; Apdx. 34a); and (c) as an apparent refinement of the foregoing, that Congress preferred that "eastern and midwestern plants used local coal, even coal with higher sulfur content than western low-sulfur coal" (Opinion 29; Apdx. 34a).

Having thus found that there was no national policy, or, if it did exist, that it favored eastern and midwestern coal in at least some circumstances, the court did not find it necessary to squarely face the question whether the Montana Coal Severance Tax substantially frustrated a

national purpose. In thus denying plaintiffs a trial, the Montana courts were plainly in error. Plaintiffs should have had an opportunity to demonstrate, to the extent necessary, both the existence and contours of the national policy, and the adverse impact of the Montana Coal Severance Tax on that policy.

1. The National Policy to Encourage Coal Production

It is beyond doubt that, since the OPEC oil embargo of 1973, national policy has clearly favored the increased production and use of coal to meet our nation's energy requirements. This policy is reflected in the express language of statutes,* in legislative history and findings, and in official pronouncements by the President and members of his Cabinet.**

The district court's opinion expressly recognized this national policy (Opinion 20; J.A.), and its holding to this effect was expressly recited by the Montana Supreme Court (Opinion 26; Apdx. 30a).

In the face of explicit statutory materials such as those cited, it would have been difficult to avoid the conclusion

---

* *See* statutes listed in the footnote at page 5, *supra*. Each of these federal statutes is a "Law of the United States" which the Supremacy Clause mandates "shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. Selected portions of these statutes are reprinted in the Appendix to the Jurisdictional Statement at pages 71a-115a.

** *See, e.g.*, Energy Policy and Conservation Act of 1975, 89 Stat. 874 (§ 2(6)), 42 U.S.C. § 6201(6) (1976); *National Energy Plan II* (prepared pursuant to 42 U.S.C. (Supp. III 1979) § 7321) at 12, II-21 (May 7, 1979); President Carter, Statement on Signing National Energy Bills (November 9, 1978), *reprinted in Weekly Compilation of Presidential Documents*: Vol. 14, No. 45; James R. Schlesinger, Remarks before 61st Anniversary Convention of the National Coal Association at 2 (June 6, 1978) (unpublished Department of Energy Release).

that national policy favors increased reliance on coal. For example, the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.*, expressly states that one of its purposes was:

> to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source . . . .

92 Stat. 3291 (§ 102(b)(3)), 42 U.S.C. (Supp. III 1979) § 8301(b)(3). Among other things, that Act prohibits new electric power plants from using oil or natural gas as a primary fuel source, and prohibits the use of natural gas in existing facilities after 1989. 92 Stat. 3298 (§ 201), 42 U.S.C. (Supp. III 1979) § 8311. Although existing plants which used natural gas as a primary source during 1977 may continue to do so until January 1, 1990, they are limited under the Act to their historical consumption. 92 Stat. 3305-6 (§ 301), 42 U.S.C. (Supp. III 1979) § 8341. Although many details reflective of the statutory purpose could be advanced, the manifest purpose of this Act to favor the use of coal is clear.*

2. The National Policy to Encourage Production of Western, Low Sulphur Coal

The statutes, regulations and other materials reflecting the national energy policy to encourage the production of low sulphur western coal are complex, and the Montana courts' examination of them—without the benefit of

---

* *See, e.g.*, S. Rep. No. 95-361, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173, 8179-80; H.R. No. 95-496 (Part IV), 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8454, 8457; Remarks of Douglas M. Costle, Administrator of the Environmental Protection Agency, [1978] U.S. Code Cong. & Ad. News 8232.

testimony and documentary evidence—was notably cursory.*

Plaintiffs asserted that the Clean Air Act, as amended in 1970, Pub. L. No. 91-604, 84 Stat. 1676, showed a national intent to maximize the production and use of western low sulphur coal. Although the mechanisms by which the Clean Air Act encouraged the use of low sulphur coal are complex, the testimony of the users of coal and others would have left no doubt that the Act was directed to that end.

Under the 1970 Amendments, the Environmental Protection Agency ("EPA") was authorized to establish standards regulating the maximum sulphur dioxide (SO_2) emissions that would be permitted from new facilities in certain categories of industries. *See generally* 84 Stat. 1683 (§ 111). In 1971 the EPA promulgated its original new source performance standards. These regulations required a reduction of up to 75% of sulphur dioxide emissions from power plants burning high sulphur coal, but imposed no controls for plants burning low sulphur coal. 40 C.F.R. §§ 60.43; 60.45(a)(2) (1972). *See* 36 Fed. Reg. 24876 (1971). The direct result of these federal statutes and regulations in existing market conditions was a virtual mandate for the use of western, low sulphur coal. Thus, there was a dramatic increase in demand for such coal as evidenced by the sharp increase in Montana's coal production during the early 1970's.** The effect of the Act continues to be felt today.

---

* From the outset, plaintiffs have maintained that a trial was necessary in order to set forth the contours of the national energy policy and its practical effect. *See* 2A C. Sands, *Sutherland Statutory Construction*, § 45.13 at 44 (4th ed. 1973).

** Production of coal in Montana increased from 1,280,000 tons in 1970 to 27,393,000 tons in 1977, but has since leveled off. (Figures were supplied to plaintiffs by the Safety and Health Division, Department of

(Footnote continued)

The court below ignored the essential thrust of this statute. It looked, instead, to the 1977 Amendments which were designed to alleviate some of the economic distress in eastern and midwestern coal mining areas caused by the earlier dramatic shift to western coal. Thus, the 1977 Amendments made minor adjustments to the overall federal policy to encourage modestly the production of high sulphur eastern and midwestern coal. (*See* Opinion 29; Apdx. 34a). The legislative history of the 1977 Amendments makes clear, however, that they did not fundamentally change the vigorous national energy policy to encourage the production of western coal, and that Congress intended "continued strong demand for low-sulphur coal in all regions of the Nation," including the west. H.R. Rep. No. 294, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077-1577 at 1245. In no sense can the 1977 Amendments be read as a reversal of the previous national policy to encourage the production of western low sulphur coal.*

By focusing on a side issue—whether "Congress would rather that eastern and midwestern plants used 'local coal,' even coal with higher sulfur content than western low sulfur coal" (Opinion 29; Apdx. 34a)—the Montana courts missed an important additional aspect of the over-

---

(Footnote continued)

Worker's Compensation of the State of Montana Department of Labor. *See also* Opinion 4; Apdx. 6a).

* According to the EPA, even after the 1977 Amendments are taken into account, production from the Northern Great Plains must grow from 54 million tons in 1975 to 602 million tons in 1995, or more than eleven times, to meet national goals; if the 1977 Amendments had not been adopted, the growth would have been to 630 million tons. *See* Table 4, *EPA Tables Relating to New Standards for New Coal-Fired Power Plants* (May 25, 1979). *See also* Bureau of Land Management of the Department of Interior, *Final Environmental Statement, Federal Coal Management Program* at 2-31 (April 1979); U.S. Department of Energy, *Energy Supply and Demand in the Midterm: 1985, 1990, and 1995* at 106 (April 1979).

all national policy. In many regions of the country, the *only* feasible source of coal is western coal; in those regions, the choice between eastern and western coal does not exist as a practical matter. If one accepts that there is a federal policy to use coal generally, it must necessarily mean the use of western coal.

For example, we call the Court's attention to the following representation of the State of Texas to the court below (Brief *Amicus Curiae* of the State of Texas at 17-18):

> [F]or economic reasons, Western coal is the only practical energy alternative for Texas and probably most of the western United States. Texas would show at [a] trial on the merits that the high cost of transportation of Eastern coal to Texas precludes its use and use of Midwestern coal is a break-even proposition only at Texas cities served by barge. When the added costs of inland rail transportation from dock to generating plants are added to the costs of pollution and pollution control for the higher sulphur content of the Midwestern coal, *Western coal is clearly seen as being the only feasible alternative to the use of petroleum*.
>
> For Texas and perhaps most of the West, Western coal is practically the only coal. The coal tax, however, frustrates the use of that coal. (Emphasis supplied).

The fact is that for parts of the country western coal is the only feasible alternative. Therefore, the policy to encourage coal generally—apparently accepted by the Montana courts— must mean encouragement of the use of western coal.

At a minimum, if there were any question about this policy it should have been resolved at a plenary trial where the policy could have been explored through the testimony of regulators, administrators, and expert wit-

nesses. The Montana courts' parochial and cursory review of this complex subject does not provide an objective answer to the issue of the contours of this national policy. At a minimum, a trial was required.

B. The Issue of "Substantial Frustration" Raises Questions of Fact which Require A Trial

The Montana courts not only misperceived the contours of our national energy policy, but also the basic constitutional standards set forth by this Court. Although the court below, at times, paid lip service to the "substantial frustration" test, it basically held that the tax could not be preempted under the Supremacy Clause unless it was expressly or by necessary implication shown to be prohibited by federal law. (Opinion 27; Apdx. 31a). This is plainly wrong.

The paramount power of federal law under the Supremacy Clause with respect to state tax legislation was firmly established over 150 years ago in the landmark decision, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Since that time, a number of other state taxes have been struck down because their effect has substantially frustrated a Congressional purpose or otherwise conflicted with federal law. *E.g.*, *Weston* v. *The City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829). *See also Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *New Jersey Insurance Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940).

As this Court has stated on numerous occasions, there are three separate tests to determine the validity of a state statute challenged on Supremacy Clause grounds. A state statute is unconstitutional if:

1. Congress has *expressly* preempted the particular field of state regulation to the total exclusion of the states; or if

2. The structure and purpose of federal regulation with respect to a particular subject matter is so pervasive as to "clearly and unmistakably" require the conclusion that Congress *intended* to prohibit all state action; or if

3. It conflicts with a federal enactment and stands as an obstacle to its execution, either directly or by frustrating the full effectiveness of the federal law.

Plaintiffs here relied on the third test of preemption from the outset. The Complaints allege (¶ 32; Apdx. 56a):

> 32. The Coal Severance Tax, on its face and as applied, substantially frustrates and impairs fulfillment of the foregoing national policies and, in particular, frustrates and impairs the purpose of the aforementioned Acts of Congress.

Under this preemption test, any state legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law" is invalid. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977), *quoting Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971). This is so irrespective of whether Congress specifically intended to preempt the particular state statute.

The issue here is whether, in the absence of any specific conflict apparent on the face of a federal statute, a state

statute which "substantially frustrates" the objectives of federal legislation is preempted by the Supremacy Clause. In this connection, it is well settled that a finding of substantial frustration may be based on an interference not apparent on the face of a statute. *E.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977); *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967); *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945). Plaintiffs do not contend—and do not need to show—that the Montana Coal Severance Tax creates a head-to-head conflict with a federal statute,* something the Montana courts seem to require. Indeed, on several occasions state laws have been held unconstitutional even though no direct conflict with federal law existed. The court below completely ignored these cases.

For example, in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), the Court struck down a state statute prohibiting payment of unemployment compensation benefits where the unemployment was due to a labor dispute. There, as here, the state statute was said not to conflict on its face with any federal statute. Nevertheless, the Court invalidated the state statute under the Supremacy Clause because it found that the effect of requiring a worker to choose between collection of unemployment benefits or filing an unfair labor charge had a direct

---

* In fact, this Court has held that a state statute may unconstitutionally frustrate *any* Congressional enactment, even though the state and federal statutes apply to entirely different areas or subject matters. Thus, in *Perez* v. *Campbell*, 402 U.S. 637, 649-52 (1971), the Court held invalid a state law which suspended drivers' licenses of persons who failed to pay judgments in law suits involving automobile accidents because the suspension conflicted with federal legislation regulating discharge in bankruptcy.

tendency to frustrate a broad policy of Congress (as reflected in the National Labor Relations Act) to encourage the filing of unfair labor practice charges. In so doing, the Court stated (page 239):

> Florida should not be permitted to defeat or handicap a *valid national objective* by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. (Emphasis supplied).

Accord, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977); *Hill* v. *Florida*, 325 U.S. 538, 542-43 (1945).*

For these reasons, the court below erred in holding that the Montana Coal Severance Tax is not preempted because the federal statutes declaring it to be national policy to encourage coal production do not also expressly and specifically prohibit or limit state severance taxes. Carried to its logical conclusion, this would mean that no tax or

---

* *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), which was relied on by the court below (Opinion 30-31; Apdx. 35a-36a) for the proposition that a state statute cannot be preempted by a broad national policy, is readily distinguishable. First, the federal statutes involved here are much more specific—the Montana Coal Severance Tax not only frustrates Congressional objectives in enacting these laws, but in some instances stands as a direct obstacle to the implementation of specific statutory provisions. *See*, *e.g.*, Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 3298 (§ 201), 3305-6 (§ 301), 42 U.S.C. (Supp. III 1979) §§ 8301, 8311, 8341. Secondly, the Court's determination in that case concerning the issue of "substantial frustration" was made after a full trial and on the basis of a printed record which was over 750 pages long and which included the testimony of no less than five expert witnesses concerning the effect of the state statute on competition. *See* Appendix to appellate briefs in the Supreme Court of the United States, Dkt. Nos. 77-10, 77-11, 77-12, 77-47, and 77-64, filed November 17, 1977.

other form of state legislation, not expressly or implicitly prohibited or limited by Congressional legislation, would ever be invalidated, regardless of the effect it may have on federal policy.

This is not, and should not be, the law. In order for our national government to function effectively, it is imperative that the fifty individual states not be permitted to enact separate laws which have the practical effect of frustrating the effectiveness of federal law. Congress is not, and should not be, required to anticipate all of the myriad ways in which states may frustrate the effectiveness of its laws. Given the wide scope of federal legislation today, this would be an impossible task and would render the effectiveness of the Supremacy Clause a virtual nullity.

Under the circumstances, it is apparent that a trial is necessary here to explore the factual issues raised in Count Two of the Complaint. At trial, plaintiffs would prove, among other things, that the Montana Coal Severance Tax has already had, and will continue to have, a substantial adverse effect on the Montana coal production necessary to implement Congressional policies. In this connection, they are prepared to proffer expert testimony (based on extensive studies and computations) designed to show (i) that without the tax, production of Montana coal would rise an additional 20 million tons annually by 1990, and (ii) because of the tax, planned mines in Montana have not opened, existing mines are operating below capacity, coal contracts have been cancelled, and new contracts for Montana coal have dropped off precipitously.

Plaintiffs' allegations that the Montana Coal Severance Tax "substantially frustrates and impairs" fulfillment of certain national energy policies raises questions of fact which, for purposes of defendants' motion to dismiss, must be accepted as true. *See generally Buttrell* v. *McBride Land & Livestock*, 170 Mont. 296, 553 P.2d 407 (1976). Consequently, Count Two of the Complaint states a valid claim under the Supremacy Clause and the court below erred in dismissing it prior to trial.

IV. THE TAX SUBSTANTIALLY FRUSTRATES THE FEDERAL STATUTORY DIVISION OF ROYALTIES FROM FEDERAL COAL DEPOSITS AND SHOULD BE HELD INVALID UNDER THE SUPREMACY CLAUSE

In Count Three, plaintiffs assert that the Montana Coal Severance Tax violates the Supremacy Clause of the United States Constitution because the tax grossly distorts the compromise between the federal government and the states expressed in the Mineral Lands Leasing Act of 1920 (ch. 85, 41 Stat. 437) (the "1920 Act"), as amended by the Federal Coal Leasing Amendments Act of 1975 (Pub. L. No. 94-377, 90 Stat. 1083), and thus "substantially frustrates" the central purposes of these Acts. (Complaint ¶¶ 41-44, Apdx. 58a-59a). This federal legislation was the culmination of more than a century-long, sometimes divisive, debate concerning the ownership, disposition and use of federally-owned mineral reserves in the western territories and states.*

---

* *See, e.g.*, H.R. Rep. No. 17 (Part 1), 64th Cong., 1st Sess. 3 (1916); H.R. Rep. No. 17 (Part 2), 64th Cong., 1st Sess. 8 (1916) (minority views); H.R. Rep. No. 668 (Part 2), 63d Cong., 2d Sess. 6 (1914) (minority views); 53 Cong. Rec. 980-81 (1916) (remarks of Rep. Taylor—Colo.).

In the end, the federal government retained the minerals for the people of the nation, subject to payment of an agreed upon share of the mineral royalties to the states in which the minerals were located. Ch. 85, §§ 1-2, 41 Stat. 437-38; ch. 85, § 35, 41 Stat. 450. On this basis, a long-standing regional dispute was finally compromised and resolved.

The court below did not dispute the district court's holding that the purpose of the 1920 Act was to share the "economic rents" from federally-owned coal deposits between the federal and state governments in the prescribed proportion provided by the statute. (*See* District Court Opinion 29-30; J.A. 84a). As noted above (pages 9-10, *supra*), these "economic rents" are the difference between the costs of production, including a reasonable profit, and the market price of the coal. This difference is normally available for payment of royalties or production taxes.

Plaintiffs allege that the tax is so excessive in amount that it seriously undercuts and disrupts this compromise by explicitly appropriating directly to Montana a major part of the "economic rents" attributable to the extraction of federally-owned coal, contrary to the mechanism adopted by the Acts. MONT. CODE ANN. § 15-35-101(e) (1979), Apdx. 62a-63a; Complaint ¶ 41, Apdx. 58a. This is so for the following reason: the higher the proportion of economic rents appropriated for the severance tax, the less that will be available for payment of royalties to the federal government. Potential coal producers, in calculating the amount they are willing to bid in royalties for federal leases, will necessarily compute the amount of state tax payable on production and must naturally reduce the amounts they are willing to bid for royalties accordingly.

The severance tax was expressly designed to absorb the available economic rents in this fashion.* In doing so, it directly conflicts with the scheme of the 1920 Act.

The reliance by the court below (Opinion 32-33; Apdx. 38a) on a proviso in the 1920 Act was misplaced. It held that the tax was not preempted because the Act specifically provided that the states could impose taxes, and did not impose any corresponding limitation on this right of the states to tax. (Opinion 32-33; Apdx. 38a). The 1920 Act did recognize the right of the states to impose *some* tax on coal, but that point is essentially irrelevant here. The Act specifically provides (ch. 85, § 32, 41 Stat. 450, 30 U.S.C. § 189 (1976)):

> Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise *any rights which they may have*, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (Emphasis supplied).

This proviso must be read in light of its purpose, and not in a manner which violates the central purpose of the Act. C. Sands, *Sutherland Statutory Construction*, §§ 20.22 at 74-75, 47.12 at 92 (4th ed. 1972-73). The proviso was included because Congress believed the royalty and rental payments provided by the Act might not necessarily be sufficient to cover legitimate impact costs. *E.g.*, 58 Cong. Rec. 7646, 7649 (1919) (remarks of Rep. Mondell). There is no suggestion anywhere that Congress

---

* Thus, the statute provides (MONT. CODE ANN. § 15-35-101(e) (1979)):

> [C]oal in Montana . . . is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes.

used a proviso of this type as a license to the states to pass unwarranted taxes and thus upset the compromise which was the basis of the Act.

Mid-Northern Co. v. *Montana*, 268 U.S. 45 (1925), cited by the court below (Opinion 33, Apdx. 39a), does not support the position that Montana has an unfettered right to impose severance taxes on federal coal. In that case, this Court merely held that lessees of the federal government, such as plaintiffs here, were not *immune* from state severance taxes, in that case a tax of 1%. Neither the proviso in the 1920 Act nor the *Mid-Northern* case speaks to the issue here. Neither should be read as a license to a state to frustrate the central purposes of the federal scheme by appropriating to itself the economic rents from the mining of coal.

The preemption principles previously discussed in connection with Count Two of the Complaint (pages 41-46, *supra*) are equally applicable here. In this respect, the fact that Congress did not specifically limit the amount of state taxes is not controlling. Any state statute which substantially frustrates the "accomplishment and execution of the full purposes and objectives of Congress" is rendered invalid by the Supremacy Clause. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

The purpose of these Acts was to divide the mineral wealth owned by the federal government in accordance with a prescribed formula. By enacting the Coal Severance Tax, Montana has in effect declared that the federally-owned coal which is mined there pursuant to the provisions of the 1920 Act, as amended, belongs to the people of Montana—not to the nation as a whole. By collection of this tax, Montana has effectively appropriated to itself the economic rents from such coal development and has thus far overstepped an exception de-

signed only to permit additional taxes necessary to cover excess impact costs. Plaintiffs thus contend that the tax substantially frustrates and impairs the important federal policies set forth in the 1920 Act.

Under the circumstances, the court below erred in affirming the district court's dismissal of Count Three of the Complaints.

CONCLUSION

For each of the reasons set forth above, the judgment below dismissing the Complaints should be reversed and the case remanded for trial.

Respectfully submitted,

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant
Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant
Westmoreland Resources, Inc.

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
THOMAS A. BUDEWITZ
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants
except Western Energy Company

January, 1981

No. 80-581

In The

Supreme Court of the United States

October Term, 1981

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER AND LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, AND WESTMORELAND RESOURES, INC. and WESTERN ENERGY COMPANY,

Appellants,

— against —

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, ELLEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, MORRIS L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

BRIEF OF APPELLEES

APPEARANCES:

MIKE GREELY
Attorney General
Counsel of Record
MIKE McGRATH
Assistant Attorney General
MIKE McCARTER
Assistant Attorney General
State Capitol
Helena, Montana 59601

OF COUNSEL:
A. RAYMOND RANDOLPH, JR.
Sharp, Randolph & Green
Suite 501
1800 Massachusetts Avenue, N. W.
Washington, D. C. 20036

Attorneys for Appellees

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

STATEMENT OF THE QUESTIONS PRESENTED

1. Was the Montana Supreme Court correct in dismissing the appellants' claims in light of the provision of the Mineral Lands Leasing Act affirmatively endorsing the right of the states to levy severance taxes and determine the rate of those taxes.

2. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax did not impose an unconstitutional burden on interstate commerce in light of the unbroken line of precedents in this and other courts sustaining such taxes over Commerce Clause challenges?

3. Was the Montana Supreme Court correct in concluding that Montana's coal severance tax satisfied the Commerce Clause requirement that a tax be fairly related to services provided by the state in light of the fact that Montana has provided the taxpayers with "services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society [*Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979)]?

4. Was the Montana Supreme Court correct in concluding that Montana's severance tax, which is "imposed on each ton of coal produced in the state," does not discriminate against interstate commerce?

5. Was the Montana Supreme Court correct in dismissing appellants' federal preemption claims where those claims were not based on any specific statutory provision but rather on an assertion that a general national aspiration may preempt a state tax?

TABLE OF CONTENTS

Pages

Statement of the Case 1

Summary of Argument 5

Argument 8

I. In Section 32 of the Mineral Lands Leasing Act of 1920, Congress granted the states permission to set severance tax rates as they saw fit. 10

II. Settled Commerce Clause principles and sound institutional considerations fully support the Montana Supreme Court's dismissal of appellants' attack on the rate of Montana's coal severance tax. 15

III. The state court properly dismissed appellants' claims that the rate of Montana's coal severance tax frustrates broad national coal policies and goals. 35

Conclusion 46

TABLE OF AUTHORITIES

CASES:

Alaska v. Arctic Maid, 366 U. S. 199 (1961) 19, 21

American Commuters, Ass'n. v. Levitt, 405 F. 2d 1148, 1152-53 (1969) 25

Andrus v. Shell Oil Co., — U. S. —, 100 S. Ct. 1932 (1980) 10

Bel Oil Corp. v. Roland, 242 La. 498, 1137 So. 2d 308, *appeal dismissed*, 371 U. S. 2 (1962) 15

TABLE OF AUTHORITIES—Continued

Pages

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 522-23 (1937) 24

Caskey Banking Co. v. Virginia, 313 U. S. 117, 119 (1941) 19

Chassanoil v. City of Greenwood, 291 U. S. 584 (1934) 20

City of Pittsburgh v. Alco Parking Corporation, 417 U. S. 379 (1974) 6, 9, 31

Colonial Pipeline Co. v. Triagle, 421 U. S. 100, 109 (1975) 25

Commonwealth Edison v. Montana, — Mont. —, 615 P. 2d 847, 849 (1980) 5

Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 (1979) 21, 22

Conley v. Gibson, 355 U. S. 41 (1957) 5

Dunbar-Stanley Studios, Inc. v. Alabama, 393 U. S. 537 (1969) 19, 21

Evansville Airport v. Delta Airlines, Inc., 405 U. S. 707 (1972) 28

Department of Revenue v. Association of Washington Stevedoring Cos., 435 U. S. 734, 750-51 (1978) 25

Douglas v. Seacoast Products, Inc., 431 U. S. 265, 282 n. 17 (1977) 18

Exxon Corp. v. Governor of Maryland, 437 U. S. 117 (1978) 8, 40, 43

TABLE OF AUTHORITIES—Continued

Pages

Exxon Corp. v. Wisconsin Department of Revenue, 100 S. Ct. 2109, 2122 (1980) 23, 26

Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17 (1934) 20

Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1, 199 (1824) 44

Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922) 15, 16, 17, 18

Hill v. Florida, 325 U. S. 538 (1945) 41, 42

Hines v. Davidowitz, 312 U. S. 52, 67 (1941) 41

Hope Natural Gas Co. v. Hall, 274 U. S. 284 (1927) 15

In re Rahrer, 140 U. S. 545 (1891) 14

Japan Line, Ltd. v. County of Los Angeles, 441 U. S. 434, 445 (1979) 7, 23, 26, 46

Jones v. Rath Packing Co., 430 U. S. 519 (1977) 41

Magnano Co. v. Hamilton, 292 U. S. 40 (1934) 32

McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316 (1819) 45

McGoldrick v. Gulf Oil Corp., 309 U. S. 414 (1940) 45, 46

Merrion v. Jicarilla Apache Tribe, 617 F. 2d 537 (10th Cir.) (*en banc*), *cert. granted*, 101 S. Ct. 71 (1980) 16

Mid-Northern Oil Co. v. Walker, 268 U. S. 45, 48-49 (1925) 11

Minnesota v. Blasius, 290 U. S. 1, 8 (1933) 17

TABLE OF AUTHORITIES—Continued

Pages

Mobil Oil Corp. v. Commissioner of Taxes, 445 U. S. 425, 448 (1980) 44

Moorman Manufacturing Co. v. Bair, 437 U. S. 267, 280 (1975) 34

Nash v. Florida Industrial Commission, 389 U. S. 235 (1967) 41, 42

New Motor Vehicle Board of California v. Orrin W. Fox, 439 U. S. 96, 110-11 (1978) 41

Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U. S. 54, 57 (1938) 43

Nippert v. City of Richmond, 327 U. S. 416 (1946) 18, 19, 30

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937) 17

Oliver Iron Mining Co. v. Lord, 262 U. S. 172 (1923) 15

Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania, 318 U. S. 261, 275 (1943) 44

Pike v. Bruce Church, Inc., 397 U. S. 137 (1970) 19

Post Oak Oil Co. v. State Tax Commission, 575 P. 2d 965 (Okla. 1978) 16

Prudential Insurance Co. v. Benjamin, 328 U. S. 408, 434-36 (1946) 14

Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887) 19

Southern Pacific Co. v. Arizona, 325 U. S. 761, 769 (1945) 14

TABLE OF AUTHORITIES—Continued

Pages

St. Louis & S. W. Ry. Co. v. Nattin, 277 U. S. 157, 159 (1928) 25

Thomas v. Gay, 169 U. S. 264, 280 (1898) 25

Union Pacific R. R. Co. v. Peniston, 85 U. S. 5, 30-31 (1873) 9, 44, 45

United States v. City of Detroit, 355 U. S. 466 (1958) 9

Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254 (1938) 30

Weston v. City Council of Charleston, 27 U. S. 171, 174 (1829) 9

White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578, 2583 (1980) 45

Wickard v. Filburn, 317 U. S. 111 (1942) 17, 18

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444 (1940) 25

STATUTES:

Section 15-35-102 (1), MCA 1

Section 15-35-102 (6), MCA 1

Section 15-35-103, MCA 1, 29

Section 15-35-108, MCA 21, 22

Section 32 of the Minerals Lands Leasing Act of 1920 ..... 10, 11, 13, 14, 15, 36

TABLE OF AUTHORITIES—Continued

	Pages
30 U. S. C. § 181 et seq.	10
30 U. S. C. § 189	6, 10, 36
30 U. S. C. § 801 et seq.	37
30 U. S. C. § 1201 et seq.	37
30 U. S. C. § 1251 et seq.	37
42 U. S. C. § 6211	37
42 U. S. C. § 6212	37
42 U. S. C. § 6231 et seq.	37
42 U. S. C. § 7411	38
42 U. S. C. § 7425	38
OTHER AUTHORITIES:	
Montana Constitution, Article IX, § 5	3
U. S. Constitution, Article I, § 9	17
U. S. Constitution, Article VI	40, 42
D. Weiner, *Reclaiming the West: The Coal Industry and Surface-mined Lands* (Inform, Inc., N. Y., N. Y. 1980)	27
Hogan and Shelton, *Interstate Tax Exportation and State Fiscal Structures*, 26 Nat. Tax J. 553 (1973)	32
K. Ross Toole, *Montana: An Uncommon Land* 7 (1957)	1, 2
L. Tribe, *American Constitutional Law* 391-400 (1977)	45

TABLE OF AUTHORITIES—Continued

Pages

M. Gillis, *Severance Taxes On Energy Resources in the U. S. Growth and Change* (Jan., 1979) 39

McLure, *Economic Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 257 (1978) 33

McLure, *The Interstate Exportation of State and Local Taxes: Estimates of* 1962, 20 Nat. Tax. J. 49 (1967) 28, 33

Peffer, *The Closing of the Public Domain* 110-133 (1951) 11

P. Hartman, *State Taxation of Interstate Commerce*, 20 n. 72 (1953) 29, 32

Shelton and Morgan, *Resource Taxation, Tax Exportation and Regional Energy Policies*, 17 Nat. Res. J. 261 (1977) 33

Coal Severance Tax: Hearing on S. 2695 Before the Senate Comm. on Energy and Natural Resources, 9th Cong., 2d Sess., 506 (1980) 5, 9, 33

Coal Severance Taxes: Hearing on H. R. 6625 and H. R. 7163 before the Subcommittee on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (1980) 4, 9, 33

President's Commission on Coal, *Coal Data Book*, 62, 63, 66 (1978) 1

President's Commission on Coal, *Report to the President* (1980) 1

TABLE OF AUTHORITIES—Continued

Pages

The Clean Air Act Amendments of 1977: A Selective Legislative Analysis, 13 Land & Water L. Rev. 747, 800-12 (1978) 38

Montana Legislative Council, *Fossil Fuel Taxation* (December, 1974) 2

1977 U. S. Code Cong. & Ad. News 1245, 1510, 1575 38

Montana Legislative Council, *Statement To Accompany The Report Of The Free Joint Conference Committee On Coal Taxation* (April 16, 1975) 3

The Federalist No. 32 (A. Hamilton) 44

House Resolutions 45 and 93 and Senate Resolution 83, Laws of Montana (1974) pp. 1419, 1453 & 1683 2

Clean Air Act Amendments of 1977 (Pub. L. 95-95, 91 Stat. 685) 37

The Energy Policy and Conservation Act of 1975 (Pub. L. 94-163, 89 Stat. 871) 37

Comptroller of Public Accounts, State of Texas, *State and Local Taxes On Oil and Gas Production: A Comparison of Texas, Louisiana, Oklahoma, and New Mexico* (1979) 4

Gates, *History of Public Land Law Development* 725-736 (1968) 11

51 Cong. Rec. 15558 (1914) 13

STATEMENT OF THE CASE

Montana imposes a severance tax on "each ton of coal produced in the state" based on the value and energy content of the coal and the method of extraction. Section 15-35-103, MCA. The effective rate of tax is less than the statutory rate because other taxes paid on production to federal, state, and local governments are excluded in computing the value of coal.[1] The tax applies equally to coal consumed in Montana and coal destined for shipment out of state.

Nature has graciously endowed the State of Montana with a wealth of natural resources, including large deposits of low sulphur coal.[2] Throughout its history, Montana's economy has depended upon the development of those resources. In the words of one historian, "Nature, not the evil designs of men, decreed that Montana be a place with a colonial economy." K. Ross Toole, *Montana: An Uncommon Land* 7 (1957). As a result, Montana has long suffered economic dislocations of boom and bust cycles of mineral production, along with the scars left from

---

1 Section 15-35-103, MCA, provides that the value of the coal is the contract sales price. Section 15-35-102 (1), MCA, defines contract sales price as "the price of coal extracted and prepared for shipment f. o. b. mine, excluding the amount charged by the seller to pay taxes paid on production . . ." Taxes paid on production are defined in § 15-35-102 (6), MCA.

2 The entire United States is rich in coal, with approximately 31% of the known recoverable coal in the world, representing a several hundred years supply. President's Commission on Coal, *Report to the President* (1980). Coal deposits are found in 31 states and mined in 26. President's Commission On Coal, *Coal Data Book*, 62-63, 66 (1978). In 1977 Montana Coal Production was 20 million tons, or 3% of the entire U. S. production. *Id.* at 66-67, 89.

mining operations. Montana's history with mining was aptly described in the opinion of the court below:[3]

> Montana's experience has shown that its mineral wealth could be exhausted and exported with little left in Montana to make up the loss of its irreplaceable resources. Montana has been painfully educated about the extreme economic jolts that follow when the mine runs out, the oil depletes, or the timber saws come still. We have a good many examples that teach us what happens to our hills when the riches of our Treasure State are spent. (J. S. 7a.)

Historically, Montana's mining has principally involved gold, silver, copper, and other metalliferous ores. Then the 1970's brought the prospect of a substantial expansion of coal strip mining.

In 1974 the Montana Legislature adopted resolutions seeking an interim study of taxation on coal production.[4] The interim study proposed several tax alternatives,[5] and in 1975 the Montana legislature enacted the present coal severance tax (Laws of Montana (1975), Ch. 525). The actual rate of the tax was settled by conference committee. In its report to the legislature that committee stated:

---

3 Montana historian K. Ross Toole gives a similar description in *Montana: An Uncommon Land* 7 (1957): "Montana's growth in one sense, has been a series of traumas. There has been a strikingly consistent pattern which, appropriately enough, conforms to the pattern of the land itself. For every pinnacle there is an equally impressive declivity. For every sudden rise, a sudden fall. Optimism has alternated almost monotonously with despair."

4 House Resolutions 45 and 93 and Senate Resolution 83, Laws of Montana (1974) pp. 1419, 1453, & 1683.

5 Montana Legislative Council, *Fossil Fuel Taxation* (December, 1974).

> In setting the level of the tax, the conference committee looked at the needs to be met. The objectives were to (a) preserve or modestly increase revenues going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new energy technologies reduce our dependence on coal and mining activity may decline."

Montana Legislative Council, *Statement To Accompany The Report Of The Free Joint Conference Committee On Coal Taxation* (April 16, 1975) [A copy has been filed with the clerk of this Court]. Thus in enacting the tax, the legislature carefully considered the legitimate needs of the State of Montana, including the need for revenue for the general support of government.

In 1976 the voters of Montana revealed their determination to reverse historical trends by overwhelmingly adopting a referendum to amend the Montana Constitution to provide that fifty percent (50%) of the proceeds from the tax be dedicated to a permanent trust fund. Montana Constitution, Art. IX, § 5. The trust fund represents a self-imposed savings account to pay for future costs of unforeseen social and environmental impacts caused by strip mining, as well as to assist in stabilizing the State's economic base when its resources are depleted or the mining activity ceases.

Many states have severance taxes. The first such tax was imposed by the State of Michigan in 1846,[6] and by 1979 thirty-three states had adopted some type of severance tax.[7] Severance taxes are levied on oil, gas, coal,

---

6 United States Department of Agriculture, *State Taxation of Mineral Deposits and Production* (1978).

7 Bureau of Census, *State Government Tax Collections in 1979*, Table 3 (1980).

copper, potash, uranium, molybdenum, vermiculite, sulfur, dolomite, sand, gravel, limestone, forest products, iron, taconite and even salt. In terms of total state revenues, severance taxes in 1979 represented 25.5% of total tax collections for Wyoming; 22% for Louisiana; 21.1% for Alaska; 18.5% for Oklahoma; 18% for Texas; and 13.5% for Montana.[8]

When viewed as a tax on energy, Montana's coal tax rate compares favorably with the tax rates imposed on oil and gas by Texas, Louisiana, Oklahoma and New Mexico. A recent study undertaken by the State of Texas for fiscal years 1977 and 1978 determined that the Texas severance tax was 6.36 cents per million BTU's of oil and gas. The rates for a million BTU's in Louisiana, Oklahoma and New Mexico were 10.26, 8.13 and 7.76 cents respectively.[9] Montana's tax per million BTU's of coal was approximately 7.11 cents.[10]

The appellants—four (4) coal companies and several of their utility customers—have brought the present ac-

---

8 *Id.* Collections by the top ten states for 1979 were as follows:

1.	Texas	$1,025,550,000
2.	Louisiana	511,589,000
3.	Oklahoma	280,982,000
4.	Alaska	173,685,000
5.	New Mexico	159,431,000
6.	Kentucky	154,017,000
7.	Florida	91,901,000
8.	Wyoming	87,419,000
9.	Minnesota	71,263,000
10.	Montana	53,919,000

9 Comptroller of Public Accounts, State of Texas, *State and Local Taxes On Oil and Gas Production: A Comparison of Texas, Louisiana, Oklahoma,* and *New Mexico* (1979).

10 See Coal Severance Taxes: Hearing on H. R. 6625 and H. R. 7163 before the Subcommittee on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 78 (1980).

tion seeking a declaration that the Montana coal severance tax is excessive and unreasonable. They also seek a refund of severance taxes paid under protest since the second quarter of 1978. The real parties in interest are the appellant coal companies, which conduct extensive strip mining operations in Montana. These coal companies are Montana taxpayers, and the tax is imposed on their local activities. The various utilities join as plaintiffs based upon appellants' assertion that the coal companies pass Montana's tax through to their utility customers rather than absorbing the tax.[11]

The appellants have made numerous factual assertions in their brief. Many of these factual statements are irrelevant to the constitutional arguments presented here. In any event Montana does not concede that appellants' factual assertions are true, but rather asserts that the appellants can prove no set of facts in support of their claims which would entitle them to relief, *Commonwealth Edison v. Montana*, — Mont. —, 615 P. 2d 847, 849 (1980); *Conley v. Gibson*, 355 U. S. 41 (1957).

SUMMARY OF ARGUMENT

Appellants' claims in this case are based entirely upon assertions that the rate of Montana's tax is too high and that a Court is an appropriate and capable institution to

11 Recent studies prepared for the State of Montana show (assuming 100% Montana's tax is passed on to the consumer) that the severance tax would account for only ½ of 1% to 2% of the residential consumer's final utility bill. Coal Severance Tax: Hearing on S. 2695 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 2d Sess., 448, 506 (1980).

determine just how much tax the state of Montana may appropriately levy. These assertions run counter to this Court's repeated pronouncements that where the power to tax exists, it is accompanied by the right to set the rate of the tax. See *City of Pittsburgh v. Alco Parking Corporation,* 417 U. S. 379 (1974). The very nature of determining an appropriate rate of taxation is a legislative function, and neither settled principles of Commerce Clause adjudication nor Supremacy Clause analysis support appellants' contention that the courts must review Montana's tax rate to determine whether it is "reasonable."

A. Appellants' contentions are initially foreclosed by the terms of the Mineral Lands Leasing Act, which explicitly reserves to the states "the right to levy and collect taxes upon improvements, output of mines, or other rights, property or assets of any lessee of the United States." 30 U. S. C. § 189. Through this section, Congress affirmatively endorsed the right of the states to determine appropriate rates of taxation free from federal interference.

B. The Montana Supreme Court dismissed appellants' Commerce Clause claim on two independent grounds, either of which is sufficient to sustain its decision.

First, the court followed the unbroken lines of precedent in this and other courts dismissing Commerce Clause attacks on state severance taxes. The sound principle underlying these decisions is this: Not every state tax that allegedly affects interstate commerce burdens it within the meaning of the Commerce Clause. Under this principle, non-discriminatory state severance taxes have never been viewed as imposing a burden on interstate commerce. The principle was right when it was first articulated; it is right today; and it is not undermined by decisions relied upon

by appellants which expansively construe the power of Congress to regulate interstate commerce.

Second, considering appellants' Commerce Clause claims on the assumption that this Court's severance tax decisions were not dispositive, the state court properly rejected appellants' contentions that the levy is not fairly related to benefits provided by the state and discriminates against interstate commerce. In providing the taxpayers with "services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society," *Japan Line, Ltd. v. County of Los Angeles,* 441 U. S. 434, 445 (1979), Montana has satisfied the "fair relation" requirement enunciated by this Court in its recent Commerce Clause opinions. The tax similarly satisfies the requirement that it not discriminate against interstate commerce; the tax, both on its face and in practical effect, falls equally on coal consumed in Montana and coal destined out of state.

C. The gravamen of appellants' general preemption claim, like the substance of their other claims, is that the rate of Montana's severance tax is too high. Appellants concede that no federal statute or national policy precludes Montana from levying a severance tax on coal, but allege that the rate frustrates "the basic thrust" of federal coal policy App. Br. 16.

Appellants fail to identify any federal statute or regulation that conflicts with Montana's tax. Congress has never expressed an intention to limit the rate of coal severance taxes. Nor has it attempted to regulate the price of coal or the many variables which increase coal costs. The purported burden any tax may put on the achieve-

ment of a general policy which may have motivated Congress in adopting specific legislation is too fragile a basis to invalidate the sovereign power of a state to design its tax structure. *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117 (1978).

D. Finally, institutional considerations strongly reinforce the state court's judgment dismissing appellants' Commerce and Supremacy Clause claims. As already noted above, appellants' case ultimately rests on their objection to the rate of the Montana tax. Appellants are therefore asking this Court to do what no court has ever done, namely, to undertake its own investigation of social, economic, aesthetic and regulatory values and establish an appropriate rate of a state general excise tax. Such judgments are plainly beyond the pale of judicial inquiry. If they are to be made at all, they must be made by state legislatures and Congress, the only bodies with both the institutional resources and constitutional authority to make them.

ARGUMENT

Appellants recognize, as they must, that states may properly impose severance taxes on coal and that nothing in the Constitution or any federal law prohibits such tax measures.[12] Appellants objection—and the basis for each of their arguments in this court—is that the particular severance tax rate adopted by Montana is too high. The extent to which Montana has overtaxed appellants

---

12 See App. Br. 20 n. *; J. S. 15; Brief of Plaintiffs-Appellants in the Court below 46-47; 52 n. 29; 79.

is a subject they do not address. Although we therefore do not know whether appellants would find a rate of 25%, 20% or some other amount acceptable, their counsel has informed both the Montana Supreme Court and Congress that 15% would pose no problem.[13] Appellants assert the proper percentage should be determined by the judiciary.

The State of Montana disagrees. Appellants are effectively asking this court to reverse its consistent holding that the right to tax encompasses the right to determine the rate of the tax, see, *e. g., Weston v. City Council of Charleston,* 27 U. S. 171, 174 (1829); *City of Pittsburgh v. Alco Parking Corporation,* 417 U. S. 369 (1974); and break with precedents which have rejected arguments similar to those made here—that a non-discriminatory state tax is nevertheless unconstitutional because it indirectly falls on some constitutionally immune or protected subject or activity, see, *e.g., United States v. City of Detroit,* 355 U. S. 466 (1958); *Union Pacific R.R. Co. v. Peniston,* 85 U. S. 5, 30-31 (1873). It is the State's position that precedents rejecting similar challenges to state tax rates should be followed; the "correct" rate of the severance tax on coal is a subject for legislative, not judicial regulation. Neither the Constitution nor any federal law requires otherwise.

---

13 In oral argument to the Montana Supreme Court, counsel for appellants conceded that a 15% rate would be acceptable. This same concession was made to Congress. Coal Severance Tax: Hearing on S. 2695 Before the Sen. Comm. On Energy and Natural Resources, 96th Congress, 2d Sess. 262 (1980) (testimony of William P. Rogers); Coal Severance Taxes: Hearings on H. R. 6625, H. R. 6654, and H. R. 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce 94 (1980) (testimony of William P. Rogers).

Finally, respondents are aware of no state tax case decided by this Court in which the Court's decision was based upon a factual inquiry into the amount or indirect incidence of a tax or into the benefits furnished by the State to the specific taxpayers. This Court should affirm the decision of the Montana Supreme Court, which properly rejected Appellants' invitation to undertake the constitutionally unwarranted and judicially unmanageable task of establishing the appropriate rate of a state tax levied for the general support of government.

I. In Section 32 of the Mineral Lands Leasing Act of 1920, Congress granted the states permission to set severance tax rates as they saw fit.

It is rather ironic that in attacking the rate of Montana's coal severance tax, appellants invoke the Mineral Lands Leasing Act of 1920,[14] 30 U. S. C. § 181, et seq., a statute that thoroughly undercuts each of their various arguments in this Court. The Act confirms in the clearest possible terms that a state may impose severance taxes on coal mined from federal land; that the appropriate severance tax rate is a matter for the state to decide; and that the exercise of these state powers is entirely consistent with federal law.

The Act contains a proviso that constitutes nothing less than congressional permission for the states to enact the type of taxing measures at issue in this case. Thus, section 32 of the Act, 30 U. S. C. § 189, provides:

---

14 Ch. 85, 41 Stat. 437. Some of the Act's history is recounted in the Court's opinion in *Andrus v. Shell Oil Co.*, — U. S. —, 100 S. Ct. 1932 (1980).

> That nothing in this Act shall be construed or held to affect the rights of the States or the local authority to exercise any rights they may have, including the right to levy and collect taxes upon improvements, *output of mines,* or other rights, property, or assets of any lessee of the United States. (Emphasis supplied.)

As the Court held more than fifty years ago, Congress intended section 32 "to remove altogether from the field of controversy, among other questions, . . . the authority of the states to impose taxes upon lessees in respect of their property" regardless of the interest of the United States in the leased land. *Mid-Northern Oil Co. v. Walker,* 268 U. S. 45, 48-49 (1925).

That Congress imposed no limits on the rates of state severance taxes does not render section 32 "irrelevant," as appellants contend (App. Br. 48). The absence of any such limitation is highly significant. As the history of this section reveals, Congress ratified the power of the states to impose severance taxes and deliberately used language that would allow the states to do so at the rate they saw fit.

The withdrawal of most areas of federal coal and oil lands by Presidents Theodore Roosevelt and William H. Taft prompted efforts to adopt a comprehensive federal leasing act for oil, gas and coal.[15] During the House debate on an early version of the Mineral Lands Leasing Act

---

15 See generally, Gates, *History of Public Land Law Development* 725-736 (1968); Peffer, *The Closing of the Public Domain* 110-133 (1951). After the first withdrawals, President Roosevelt sent a message to Congress suggesting "that there should be some provision for leasing coal, oil and gas rights. . . ." 41 Cong. Rec. 450 (1906); 41 Cong. Rec. 2077 (1907).

(H. R. 16136, 63d Cong., 2d Sess. (1914)), western Congressmen expressed concern that under the bill the States might be unable to tax the production of federal lessees. Representative Lenroot of Wisconsin took the lead in answering western fears by pointing out that a "State can tax the product of that mine [leased under the bill] *just such sum as it* [the State] *chooses.*" 51 Cong. Rec. 15058 (1914). Later, referring to a Colorado company mining coal on lands it owned, Rep. Lenroot and Rep. Mondell of Wyoming engaged in the following colloquy:

> Mr. Lenroot: * * *
>
> * * * [M]uch has been said concerning the matter of taxation and the denial of these States of taxes to which they are entitled. Again, referring to the Colorado Iron and Fuel Co., they do pay some taxes, it is true, to the State of Colorado upon their lands; but if those lands were under lease, the State of Colorado would receive under this bill one half of the proceeds of these [federal] royalties, and *in addition the state of Colorado could tax the output—every ton of coal mined by the Colorado Iron and Fuel Co.—in such sums as its legislature in its wisdom might choose to impose.*
>
> * * *
>
> Mr. Mondell:
>
> Is the gentlemen sure—quite sure—as a legal proposition that the State can tax the output of these leased mines?
>
> Mr. Lenroot:
>
> I am absolutely certain. * * *
>
> Mr. Mondell:
>
> I am glad to have the gentleman's opinion and I hope he is right because this is our only hope under this legislation.

51 Cong. Rec. 15064-65 (1914) (emphasis supplied).

Later in the debate, Representative Ferris, sponsor of the bill and Chairman of the Public Lands Committee which favorably reported the bill to the floor of the House, lent his support to Representative Lenroot's assurances, stating "[t]here is no doubt but that your legislature has the authority to impose an excise tax that will catch every pound of coal and every gallon of oil produced," and that this taxing authority was in addition to any royalty sharing. 51 Cong. Rec. 15558 (1914).

Although the bill under consideration in the debate recited above contained no express recognition of state taxing power, this was remedied in the next Congress when the House Committee on Public Lands offered an amendment to the pending leasing bill. After minor changes in the Committee's proposal, the House adopted the amendment, which contained language nearly identical to that ultimately enacted as section 32 of the Mineral Lands Leasing Act of 1920.[16]

In the House debate immediately preceding passage of the 1920 Act, Representative Mondell again stressed that the proviso affirmed state power to tax leasehold improvements and mine output of federal lessees. 58 Cong. Rec. 7646 (1919). Despite protests that under the proviso the

---

16 The amendment adopted by the 64th Congress read:

> Provided that nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessees.

53 Cong. Rec. 1122-1123 (1916). Representative Mann of Illinois characterized the proposition that the states could tax the property of lessees as one on which "we are all agreed," 53 Cong. Rec. 1122 (1912); the adoption of the amendment reflected that view.

states would have the power to levy "burdensome taxes" and thereby ruin lessees and render the leases of no value (58 Cong. Rec. 7647 (1919) (remarks of Rep. McLaughlin)), Congress passed section 32 without further changes.

Congress thus intended by section 32 to grant the states permission to impose severance taxes on coal and other minerals at the rate the states themselves deemed appropriate.[17] Both proponents and opponents of section 32 agreed that the proviso had that purpose and effect.

The significance of section 32 to appellants' arguments[18] in this Court is apparent. Since Congress has granted express permission to the states to do precisely what appellants protest—namely, exercise the plenary power to set their own severance tax rates—it cannot be said that the rate of a state severance tax may render the tax unconstitutional.[19]

For similar reasons, appellants' Supremacy Clause arguments must be rejected in light of section 32. Montana's tax cannot be considered inconsistent with federal law when Congress itself has ratified the state's power

---

17 While section 32 of the Mineral Lands Leasing Act applies only to taxation of federal lessees, it is inconceivable that Congress intended to permit states greater authority to tax federal lessees than other taxpayers.

18 The appellants continue to assert that the coal taxed by Montana is federal coal, and thus belongs to the people of the United States as a whole. What they ignore is that through leases the federal government has sold its interests in the coal and the people of the United States, through royalties, will receive their fair rate of return. [See Opinion below J. S. 27 (a).]

19 See *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 434-36 (1946); *In re Rahrer*, 140 U. S. 545 (1891); see *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769 (1945).

and authority to impose the tax and set the rate. While appellants may believe that contemporary conditions warrant restrictions on the states' authority, that is a matter for Congress to decide. Until and unless Congress acts,[20] Montana is free to exercise the authority confirmed in section 32 of the Mineral Lands Leasing Act of 1920.

We therefore submit that section 32 is a sufficient basis for rejecting each of appellants' contentions regarding Montana's tax. In the discussion that follows we address each of appellants' Commerce and Supremacy Clause arguments and discuss why, even aside from section 32, those arguments must be rejected.

II. Settled Commerce Clause principles and sound institutional considerations fully support the Montana Supreme Court's dismissal of appellants' attack on the rate of Montana's coal severance tax.

A. The Decisions of This and Other Courts Repudiating Commerce Clause Challenges to State Severance Taxes Reflect Wise and Established Principles of Commerce Clause Adjudication and Should Not Be Disturbed.

The arguments appellants raise are not new. For nearly sixty years this Court and other courts have consistently rejected Commerce Clause attacks on state severance taxes. *See, e. g., Heisler v. Thomas Colliery Co.,* 260 U. S. 245 (1922); *Oliver Iron Mining Co. v. Lord,* 262 U. S. 172 (1923); *Hope Natural Gas Co. v. Hall,* 274 U. S. 284 (1927); *Bel Oil Corp. v. Roland,* 242 La. 498, 1137 So. 2d

---

20 See *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U. S. 425, 448-449 (1980); *cf. United States v. Detroit,* 355 U. S. 466, 474 (1958).

308, *appeal dismissed,* 371 U. S. 2 (1962); *Post Oak Oil Co. v. State Tax Commission,* 575 P. 2d 965 (Okla. 1978); cf. *Merrion v. Jicarilla Apache Tribe,* 617 F. 2d 537 (10th Cir.) (*en banc*), *cert. granted,* 101 S. Ct. 71 (1980). Contending that a severance tax upon coal destined for shipment to other states burdened interstate commerce, the taxpayers in *Heisler v. Thomas Colliery Co., supra,* argued, as appellants argue here, that:

> Pennsylvania has a natural monopoly of anthracite coal in this country. That coal is a prime necessity of life, especially in the northeastern States. Eighty percent of such coal is shipped out of Pennsylvania . . . [and the] intention at the time this act was passed was so to use the natural monopoly which Pennsylvania possesses as to compel the inhabitants of the United States to pay a tax to Pennsylvania. (260 U. S. at 251-52.)

Despite these allegations the Court held that Pennsylvania's tax on the local activity of severing natural resources from the earth did not constitute a burden on interstate commerce within the meaning of the Commerce Clause.

Appellants make no effort to distinguish the present case from *Heisler* and its progeny. Instead, they argue that times have changed, that the country now has a pressing need to develop its energy resources, and that *Heisler* rests on an outmoded analysis of the Commerce Clause.

Appellant's prediction of "grave practical consequences to this nation" unless the rate of each state's severance tax is subject to judicial examination at a trial completely ignores both inherent market limitations in fixing tax rates and the role of Congress under the Com-

merce Clause. Appellants argue that the scope of congressional power to regulate interstate commerce has expanded considerably since the Court decided *Heisler,* however, they fail to recognize that as a result Congress has ample authority to deal with severance tax rates on coal if it should deem this necessary or appropriate.[21] Rather than a reason for overruling *Heisler,* the expansion of congressional power is a reason for adhering to that decision.

Citing cases such as *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937) and *Wickard v. Filburn,* 317 U. S. 111 (1942), appellants argue that because Congress could determine the appropriate limits of such tax rates, the courts should do so. Appellants, however, have confused the Commerce Clause's affirmative grant of power to Congress "to regulate Commerce. . . . among the several States," U. S. Const., Art. I, § 9, cl. 3, with the negative implications of the Clause. This Court has consistently recognized the substantial differences between Commerce Clause considerations bearing on the scope of congressional power and those bearing on the limitations on state power. See, *e.g., Minnesota v. Blasius,* 290 U. S. 1, 8 (1933).

Thus while appellants cite *Wickard* for the proposition that the Commerce Clause's negative restraints have been broadened by decisions expanding the scope of congressional power (App. Br. 18, 21), the Court in *Wickard*

---

21 Congress, unlike the Court, has numerous options available. It could, for example, prohibit the pass through of the tax by coal companies; provide federal tax deductions to offset the tax; or pass legislation giving the states an incentive to reduce their taxes.

made exactly the opposite point. The Court observed that the scope of congressional authority depended on an inquiry into "what was 'necessary and proper' to the exercise by Congress of its granted power," 317 U.S. at 121, whereas the point of reference for limitations on state authority was the "concept of sovereignty . . . implicit in the status of statehood." *Id.* Hence in determining whether Congress had the authority under the Commerce Clause to regulate activities affecting interstate commerce, the Court in *Wickard* was not confined by the holdings in cases such as *Heisler,* that state taxes on those activities imposed no burden on interstate commerce. This was not because these cases were no longer authoritative but rather because the considerations underlying the scope of congressional power under the Commerce Clause are of little aid in determining whether state action burdens interstate commerce.[22] As the Court recently observed:

> [S]tatements . . . made in upholding the rights of States to tax what was argued to be interstate commerce . . . are not used interchangeably as statements of law where the issue is the power of Congress to regulate under the Commerce Clause. The restrictions imposed by the Commerce Clause standing alone may well be less than the preemptive reach of statutes passed by Congress pursuant to the power. (*Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 n. 17 (1977).)

Appellants also contend that the Montana Supreme Court's adherence to *Heisler* contravenes *Nippert v. City*

---

22 To take the facts of *Wickard* itself, it can hardly be contended that the existence of congressional power to regulate the production of wheat grown for "home" consumption warrants the inference that a state tax upon such consumption imposes a burden on interstate commerce.

of Richmond, 327 U.S. 416 (1946). See App. Br. 22. *Nippert* is one of a long line of cases involving fixed-fee license taxes imposed on solicitation of orders for interstate sales.[23] From the beginning, the Court has held that solicitation of interstate sales is an integral part of interstate commerce and that a tax upon such activity imposes a burden on commerce. *Robbins v. Shelby County Taxing District,* 120 U.S. 489 (1887). The Court, however, has been careful not to obliterate the distinction between taxes that do and taxes that do not burden interstate commerce. See, *e.g., Caskey Banking Co. v. Virginia,* 313 U.S. 117, 119 (1941).

Countless other decisions of this Court reflect the settled principle on which the severance tax decisions are based: Not every state tax that allegedly affects interstate commerce burdens it within the meaning of the Commerce Clause, *see, e.g., Dunbar-Stanley Studios, Inc. v. Alabama,* 393 U.S. 537 (1969); *Alaska v. Arctic Maid,* 366 U.S. 199 (1961); *Caskey Baking Co. v. Virginia, supra.* The continued existence of this threshold requirement—that a state tax must burden interstate commerce to justify an inquiry into the substantive criteria for adjudicating Commerce Clause controversies—is demonstrated by the Court's opinion in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). The Court in *Pike* explicitly addressed this "threshold contention" in the context of

---

23 *Nippert* itself involved a license tax upon "persons . . . engaged in business as solicitors" measured by a fixed fee and a percentage of gross receipts.

a challenged state regulation, *Id.* at 140.[24] Moreover, it carefully distinguished two state tax cases that had relied in part on previous severance tax decisions in concluding that the levies at issue did not burden interstate commerce. *See Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17 (1934) and *Chassanoil v. City of Greenwood,* 291 U.S. 584 (1934), discussed at 397 U.S. at 141.

The court below thus correctly held that before undertaking an inquiry into the tax's validity under substantive Commerce Clause criteria, a court must find that the tax burdens interstate commerce within the meaning of the Clause. Otherwise every allegation that a tax affects interstate commerce would require an elaborate inquiry under the Commerce Clause; no state tax would be free from Commerce Clause attack; and any state taxpayer could generate a substantial lawsuit merely by asserting that the levy affects interstate commerce. This Court has therefore recognized the necessity of drawing a line between challenges to taxes that burden interstate commerce, which justify a further inquiry into whether the burden is defensible, and challenges to taxes that do not burden interstate commerce, which may be dismissed.

State severance taxes have never been viewed as imposing a burden on interstate commerce. The essentially local nature of the activity taxed—the extraction of natural resources from the earth—and the remoteness of the

---

24 The Court's holding on this point—that an order expressly forbidding interstate bulk shipment burdens interstate commerce—was unexceptional. A more onerous burden on interstate commerce is difficult to imagine.

activity from the stream of commerce,[25] have consistently led this and other courts to conclude that Commerce Clause attacks on such levies may be disposed of summarily. Recent decisions of this Court continue to adhere to this view. *Dunbar-Stanley Studios, Inc. v. Alabama, supra; Alaska v. Arctic Maid, supra.*[26] Furthermore, this Court's repeated approval of its severance tax decisions reflects the wise judgment that abandonment of them could create judicial and administrative chaos and that Congress, not the Judiciary, is the only body with constitutional authority and institutional competence to determine what limits, if any, should be imposed on the rate of state severance taxes (see p. 34, infra).

B. Montana's Coal Severance Tax Satisfies This Court's Requirements That A Tax Be Fairly Related to Benefits Provided by the State and That It Not Discriminate Against Interstate Commerce.

Although we submit that the Court's severance tax cases are dispositive of appellants' Commerce Clause claims, Montana's coal severance tax also passes muster under the substantive criteria the Court has articulated

---

25 Compare with *Complete Auto Transit, Inc. v. Brady*, 430 U. S. 274 (1979).

26 Appellants seek to minimize the significance of the Court's contemporary opinions that embrace the rule of the severance tax cases by arguing that the severance tax cases are cited only for the proposition that taxpayers engaged in certain activities are not immune from taxation. App. Br. 20. n. *. As a fair reading of *Dunbar-Stanley* and *Arctic Maid* demonstrates, however, the severance tax cases were invoked for the broad proposition that they still support: A tax on the extraction of natural resources does not burden interstate commerce.

in recent opinions involving state tax controversies. The Court has stated that it will sustain a tax against Commerce Clause challenge

> [w]hen the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. (*Complete Auto Transit, Inc. v. Brady, supra,* 274, 279 (1977).)

Applying these standards, the Montana Supreme Court properly concluded that Montana's coal severance tax was fairly related to benefits provided by the state and did not discriminate against interstate commerce.[27] J. S. 19a-27a.

1. Montana's Coal Severance Tax Is Fairly Related to the Benefits Provided Appellants by the State.

The state court's determination that Montana's coal severance tax is fairly related to benefits provided by the state is unassailable. Montana has provided the appellants with unquantifiable benefits. It has provided them with the benefits of fire and police protection; of an educated work force; of roads and waterways; an organized government; an orderly system of laws and an economic infrastructure and social machinery that are essential preconditions to the conduct of modern business activity. These benefits are of incalculable value and plainly satisfy the consideration that a tax be fairly related to benefits

---

27 Appellants conceded below that the activities taxed have a substantial nexus to the State and that the tax is fairly apportioned to activities carried on there. Brief of Plaintiffs-Appellants 52.

provided by the state. The Court's statement in regard to a California levy is dispositive here:

> The tax . . . is "fairly related to the services provided by" California, services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society. (*Japan Line Ltd. v. County of Los Angeles*, 441 U. S. 434, 445 (1979).)

See also *Exxon Corp. v. Wisconsin Department of Revenue*, 100 S. Ct. 2109, 2122 (1980).

Appellants' contend, however, that before considering the "fair relation" criterion a court must undertake a detailed factual inquiry into the question whether the market value of the benefits provided the taxpayers is substantially equivalent to the amount of the tax imposed. They argue that a trial is necessary to determine "whether a reasonable relationship exists" between the amount of the tax and the "costs or benefits involved," including "the legitimate needs of Montana." App. Br. 30-31. Appellants' contention finds no support in the relevant decisions of this Court or in sound principles of constitutional adjudication.

The Court has never suggested that the "fair relation" criterion contemplates a detailed factual investigation into the value of particular state-provided benefits or taxpayer-imposed costs to determine what particular quantitative relationship they bear to the amount of a general excise tax like Montana's.[28] Nor has the court

---

28 As indicated above (see p. 3, *supra*) and as the Montana Supreme Court explicitly held (J. S. 22a), the coal severance

(Continued on next page)

suggested that based upon a potentially monumental inquiry, the courts must then decide what is "fair." This Court knows what is apparent not only to every state legislature, but to Congress itself.

> [A] tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principles of government—that it exists primarily to provide for the public good. A corporation cannot object to the use of taxes which it pays for the maintenance of schools because it has no children. . . . This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are not peculiarly beneficial to him. (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 522-23 (1937).)

(Continued from previous page)

tax was "imposed for the general support of the government." Appellants originally took no issue with this conclusion (J. S. ii), although now they suggest that the levy is not imposed for the general support of government because some of the tax revenues will not be immediately expended. App. Br. 30. While this contention is a non-sequitur, the critical point for present purposes, which appellants do not and indeed, cannot dispute, is that Montana's tax is a levy imposed for broad governmental needs such as environmental protection and public education, § 15-35-108, MCA, as distinguished from a levy imposed as a charge for a specific state-provided service. *See* pp. 31-32, *infra*.

Accord, *St. Louis & S.W. Ry. Co. v. Nattin,* 277 U. S. 157, 159 (1928); *Thomas v. Gay,* 169 U. S. 264, 280 (1898); *American Commuters, Ass'n. v. Levitt,* 405 F. 2d 1148, 1152-53 (1969). Thus, in rejecting a Commerce Clause challenge to the application of Louisiana's business privilege tax on an interstate pipeline company, the Court, after adverting to the "fair relation" criterion, declared that "[t]he simple but controlling question is whether the state has given anything for which it can ask return." *Colonial Pipeline Co. v. Triagle,* 421 U. S. 100, 109 (1975) (quoting *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 444 (1940)). It concluded that the "powers, privileges, and benefits" Louisiana had bestowed upon the pipeline —namely, the benefits and privileges associated with its ability to carry on business in corporate form—were sufficient to justify the tax. 421 U. S. at 109. The Court made no effort to ascertain the precise value of these benefits to the taxpayer.

Similarly, in dismissing Commerce Clause objections to the application of Washington's business privilege tax on gross receipts from stevedoring activities, the Court summarily disposed of the taxpayer's "fair relation" contention with the remark that "[n]othing in the record suggests that the tax is not fairly related to services and protection provided by the State." *Department of Revenue v. Association of Washington Stevedoring Cos.,* 435 U. S. 734, 750-51 (1978). There is nothing to suggest that the Court based its conclusion on a considered judgment that the value of specific benefits provided by the state had some particular quantitative relationship to the amount of the tax. Indeed, as Justice Powell's concurring opinion observed, the Court's conclusion that the "fair relation"

test was satisfied "cannot be questioned" since the taxpayers "undoubtedly avail themselves of police and fire protection, as well as other benefits Washington offers its local businesses." *Id.* at 764.

The Court's most recent observations that the "fair relation" criterion will be satisfied if the state provides the taxpayer with "the benefit of a trained work force, and 'the advantages of a civilized society,'" *Exxon Corp. v. Wisconsin Department of Revenue, supra,* 100 S. Ct. at 2122; *Japan Line, Ltd. v. County of Los Angeles, supra,* 441 U. S. at 445, further demonstrate that a trial with an elaborate factual investigation is unnecessary to resolve the "fair relation" issue.[29] Appellants' contrary position is an invitation to transform the courts into legislative committees to hold hearings into whether a certain tax rate is "fair" and allow taxpayers to attempt to quantify what benefits they receive from the State. But appellants do not suggest how a court is to value the benefits of police and fire protection, the elaborate network of roads and waterways, or the orderly system of laws that Montana provides them. We are not told how a court is to measure in dollar terms the value of a trained work force or the economic infrastructure and social machinery that are essential preconditions to the conduct of modern business activity. One can only guess by what standard a court should assess costs imposed on Montana as a result of the loss of aesthetic values, the increases in crime, alcoholism, and divorce, and the exhaustion of a nonrenew-

---

29 Montana's position is even stronger if one compares the nature of the contacts with the State in those cases with the strip mining activity conducted in this case.

able resource that constitutes the state's economic base. How can a court measure in dollar terms the costs of environmental degradation that are presently unknown and, indeed, unknowable? If appellants' coal-mining activities destroy Montana's underground aquifers, in which much of the state's scarce water supply flows, it will literally destroy the lifeblood of Montana society. The impact appellants' activities will have is not something that can presently be determined.[30] The only certainty is that after the last ton of coal is mined and the last dollar of severance tax is paid, Montana will have to deal with these and a host of other problems that the coal companies leave in their wake.[31]

The State vigorously disputes appellants' self-serving assertion that there is "unlikely" to be a "serious dispute" over the "fair relation" issue should the matter be remanded for trial (App. Br. 31). But to require the State of Montana to demonstrate the present and future benefits it furnishes appellants would surely precipitate attacks on the "fairness" of the various revenue measures of other states. According to appellants' Commerce Clause theory, an allegation by a taxpayer that a state is "exporting" its tax burden entitles the taxpayer to a trial on whether the tax is "fairly related" to benefits provided by the state App. Br. 29-31. Since every state in the

---

30 See generally, D. Weiner, *Reclaiming the West: The Coal Industry and Surface-mined Lands* (Inform, Inc., N. Y., N. Y. 1980).

31 Montana is wisely setting aside in trust a part of its severance taxes so that future generations will not have to bear the cost of these burdens without the possibility of assistance from the very activity which created them.

country "exports" its tax burden to some extent,[32] there would be no end to "fair relation" challenges to state revenue measures. No doubt Texas, which appears here as an *amicus,* will soon be defending the fairness of its own severance taxes on oil and gas, which are substantially equivalent to Montana's tax on coal when the levies are compared on equivalent units of energy, see pp. 4-5, *supra.*

Nor will taxpayers by any means be confined to severance taxes in mounting "fairness" challenges to state revenue measures. New York's tax on stock transfers[33] which falls heavily on out-of-staters,[34] Florida's tax on hotel and motel receipts[35] which falls largely on tourists, and Michigan's taxes on the automobile industry[36] which are passed on to consumers nationwide, are all vulnerable to the charge that the state is attempting to tailor its taxes to fall largely on non-resident consumers. Indeed, even general income and sales taxes would be subject to such an attack.[37]

Finally, appellants rely on several cases in which the Court has allegedly undertaken a detailed factual inquiry into the "fair relation" question in adjudicating the validity of a state tax. See App. Br. 32 citing, *e. g., Evans-*

---

32 See McLure, *The Interstate Exportation of State and Local Taxes: Estimates of 1962,* 20 Nat. Tax J. 49 (1967).

33 N. Y. Tax Law § 270 *et seq.* (McKinney 1966, Supp. 1980-81).

34 See *Boston Stock Exchange v. State Tax Comm'n,* 429 U. S. 318 (1977).

35 Fla. Stat. Ann. § 212.03 (1980).

36 *E. g.,* Mich. Comp. Laws Ann. § 208.1 *et seq.* (Supp. 1980-81).

37 See McLure, *supra,* note 22.

ville Airport v. Delta Airlines, Inc., 405 U. S. 707 (1972). Every one of these cases, however, involved a fee that was designed and defended as a specific charge imposed by the state for the use of state-owned or state-provided transportation facilities or services. These "user charges" are assessed as reimbursement for specific quantifiable services furnished by the government to the user, not for general revenue purposes. Highway use taxes and similar levies "are not true revenue measures and . . . the considerations applicable to ordinary tax measures do not apply." P. Hartman, *State Taxation of Interstate Commerce*, 20 n. 72 (1953). They are "rather of the nature of a rent charged by the State, based upon its proprietary interest in its public property . . ." *Id.* at 122. It may well be appropriate in cases involving such fees to inquire into the relationship between the amount of the fee and the specific service or benefit for which the fee is charged. The holdings of those cases, however, have no bearing on the validity of a general excise tax, such as the coal severance tax, which is neither designed nor defended as a *quid pro quo* for a particular service or benefit rendered by the state.

2. Montana's Coal Severance Tax Does Not Discriminate Against Interstate Commerce and Is Not "Tailored" to Fall on Residents of Other States.

Montana's coal severance tax is "imposed on each ton of coal produced in the state." Section 15-35-103, MCA. The levy is nondiscriminatory on its face. It applies to all coal extracted in the state; it applies without regard to the ultimate destination of the coal—whether inside or outside the state; and it applies without regard to the nature

of the enterprise extracting the coal—whether local or interstate. No claim is or can be made that the coal severance tax explicitly discriminates against interstate commerce.

It is true, of course, that the Commerce Clause forbids taxes which, though nondiscriminatory on their face, by their practical operation discriminate against interstate commerce. *See, e. g., Nippert v. City of Richmond, supra.* Montana's coal severance tax cannot reasonably be characterized as such a levy, however. The degree to which either local or interstate business shoulders the burden of the tax is determined according to the amount or value of the coal extracted and not according to any distinction—in principle or in practice—between local and interstate commerce. Coal consumed in Montana is not treated differently than coal destined out-of-state. Appellants have never contended otherwise, and appellants' concession that Montana may properly tax coal at some lower rate contradicts their assertion that the tax is discriminatory.

To the extent that appellants' claim of discrimination is predicated on the fact that the coal in question is transported out-of-state so that the tax burden allegedly falls on out-of-state consumers, it fails to state a claim under the Commerce Clause. The states do not discriminate against interstate commerce—nor do they improperly "tailor" their taxes to fall on residents of other states—when they demand from those consuming local resources payment for the costs imposed on and benefits provided by the state with respect to the extraction of these resources. Interstate commerce, this Court has frequently held, must pay its way. *See e. g., Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, 254 (1938).

By conceding that Montana has power to impose a coal severance tax on their activities (App. Br. 6), appellants have conceded that the tax is not by its nature illicitly discriminatory or "tailored." Their theory is that it becomes so only when the rate gets too high. Appellants' discrimination and "tailored tax" claims are rooted in their contention that the tax is "excessive" (J. S. i) and that interstate commerce is therefore being made to pay *more* than its way, which merely restates their argument that the coal severance tax is not fairly related to benefits provided by the state. Because the "fair relation" criterion is met in this case (*see* pp. 24-32, *supra*), it cannot plausibly be argued that interstate commerce is paying more than its way.

C. Sound Institutional Considerations Reinforce the Conclusion That Appellants' Commerce Clause Claims Were Properly Dismissed.

As we have indicated, the heart of appellants' case is "that the tax is excessive in amount and thereby violates the Commerce and Supremacy Clauses of the Constitution." (J. S. i, App. Br. 6). By appellants' reasoning there must be some rate at which the tax would pass constitutional muster, and it is the task of the courts to ascertain that rate.

The judiciary, however, has never undertaken the task that appellants would thrust upon it—the determination of the appropriate rate of a general excise tax. Indeed, whenever taxpayers have invited this Court to become embroiled in controversies over the amount of a general excise tax, it has steadfastly declined to do so. *See, e. g., City of Pittsburgh v. Alco Parking Corp.*, 417 U. S. 369

(1974) and cases cited therein; *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934). While many of the cases repudiating challenges to taxes on the basis of their amount involved the Due Process Clause, their reasoning is applicable to Commerce Clause challenges as well.[38] The Court's decisions are predicated on the fundamental consideration—ignored by appellants here—that the determination of the proper rate of a tax is quintessentially a legislative judgment beyond the pale of judicial competence.

The Court's recognition that determining the proper rate or amount of a state tax is not a judicial function, reflects sound institutional considerations. If courts were saddled with the responsibility of determining the appropriate amount of a tax, based on an inquiry into the quantitative relationship between the tax burden and the costs and benefits involved, they would become entangled in issues which they are institutionally ill-equipped to resolve. Given the inherent limitations of a court's own resources and the judicial process, a court is simply incapable of putting a dollar value on ecological damage, social disruption, and the loss of an economic base. Courts would also be required to struggle with the elusive question of the economic incidence of the tax to determine whether a taxpayer who alleges that he is paying an "excessive" tax is actually bearing the tax burden.[39]

---

38 See P. Hartman, *State Taxation of Interstate Commerce* 19 (1953).

39 *See, e. g.*, Hogan and Shelton, *Interstate Tax Exportation and State Fiscal Structures*, 26 Nat. Tax J. 553 (1973); McLure,

(Continued on next page)

This Court's consistent position that such issues are not judicially cognizable does not mean that there are no restraints on Montana's power to set its own tax rates or that taxpayers aggrieved by the rate of a state tax affecting interstate commerce have no avenue for relief. While a court is an inappropriate forum for determining the rate of a tax, a legislative body is fully capable of making such a determination. And in the context of the present controversy, it is Congress that has the ultimate responsibility to contend with Montana's coal severance tax rates, if it sees fit to do so.

Congress, in fact, has been focusing abundant attention on national energy policy in general and on the very issues that divide the parties here. Legislation directed specifically at the problem appellants seek to have this Court resolve was introduced in the Ninety-Sixth Congress;[40] hearings at which appellants fully presented their views were held on the proposed legislation;[41] and the legislation was approved by the House Subcommittee on

---

(Continued from previous page)

Economic Constraints on State and Local Taxation of Energy Resources, 31 Nat. Tax J. 257 (1978); McLure, *supra* note 32; Shelton and Morgan, *Resource Taxation, Tax Exportation and Regional Energy Policies*, 17 Nat. Res. J. 261 (1977).

40 S. 2695, 96th Cong., 2d Sess. (1980); H. R. 7163, 96th Cong., 2d Sess. (1980); H. R. 6654, 96th Cong., 2d Sess. (1980); H. R. 6625, 96th Cong., 2d Sess. (1980).

41 Coal Severance Tax: Hearing on S. 2695 Before the Senate Comm. on Energy and Natural Resources, 96th Cong., 2d Sess. (1980); Coal Severance Taxes: Hearing on H. R. 6625, H. R. 6654 and H. R. 7163 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (1980).

Energy and Power.[42] Similar legislation has already been introduced this session. S. 178, 97th Cong., 1st Sess. (1981).

It is therefore apparent that Congress is fully aware of and involved in the conflict that only the legislative branch is capable of resolving. In recent years, Congress has shown itself willing to legislate in the state tax field when, in its judgment, state tax legislation threatened to impose a burden on interstate commerce.[43] Armed with the extensive information provided by its hearings and by staff research, Congress can make an informed political judgment as to whether a rate limitation or other action to offset state severance taxes is warranted. As this Court has frequently recognized, the resolution of such issues has been committed by the Constitution to the legislative branch. *See, e. g., Moorman Manufacturing Co. v. Bair*, 437 U. S. 267, 280 (1975).

---

42 Report Bulletin No. 12, Prentice Hall State and Local Taxes (All States Unit) (Sept. 16, 1980).

43 See 15 U. S. C. § 381 *et seq.* (1976) (limiting states' power to tax income from interstate commerce); 15 U. S. C. § 391 (1976) (prohibiting states from imposing electrical energy taxes discriminating against out-of-state purchasers); 15 U. S. C. § 78bb (d) (1976) (prohibiting states from imposing stock transfer taxes when the only nexus between the state and the transaction is the presence of the transfer agent); 49 U. S. C. § 1513 (1976) (prohibiting states from imposing user charges in connection with the carriage of persons in air commerce). 49 U. S. C. § 11503 (1978) (prohibiting states from taxing railroad property more heavily than other industrial and commercial property); Motor Carrier Act of 1980, Pub. L. 96-296 § 31, 94 Stat. 793 (to be codified at 49 U. S. C. § 11503a) (prohibiting states from taxing motor carrier property more heavily than other industrial and commercial property.)

III. The state court properly dismissed appellants' claims that the rate of Montana's coal severance tax frustrates broad national coal policies and goals.

Appellants' Supremacy Clause claims, like their Commerce Clause claims, are in substance an attack on the rate of Montana's coal severance tax. Appellants concede that no federal law or policy prevents Montana from levying some kind of coal severance tax (App. Br. 6), but assert that Montana's tax is preempted on the ground that the rate of the tax is purportedly repugnant to "the basic thrust of federal policy," App. Br. 16, 46-47.

Appellant's preemption claims are subject to the same fundamental objections that have already been raised: Congress has affirmatively approved the authority of the States to determine severance tax rates and, in any event, the determination of the proper rate or amount of a tax is a state prerogative and a legislative not a judicial function. Even if Congress had not adopted affirmative legislation endorsing the state's right to set severance tax rates, see pp. 11-16, *supra,* it is inappropriate for a court to invalidate a state tax solely on the ground that the rate is too high. No court has ever held a tax preempted on that basis.

Moreover, appellants have seriously misconstrued the nature and effect of national policies concerning coal. Their assertion that the rate of a state tax may be preempted because it increases the cost of some federally favored activity finds no support in settled principles of preemption analysis.

A. Montana's Coal Severance Tax Does Not Frustrate the Purposes and Policies Embodied in the Federal Legislation Cited by Appellants.

Appellants' Count II preemption claim is based on a selective reading of national energy legislation, through which they have attempted to carve out an alleged policy regarding western coal. Although appellants have cited numerous federal statutes dealing with coal and energy in general (App. Br. 5, note*) nowhere do they contend that the Montana Coal Severance Tax is preempted by any specific provision of any of these acts. In fact, congressional action in the area of coal policy has been specific and limited, and there is nothing in existing legislation to suggest that Congress either intended to limit state taxes on coal or to elevate any policy encouraging coal use to preeminence over other policies which may reduce its use or increase its cost. To the contrary, congressional action reflects a continued solicitude for state tax powers and for other state and national policies that may compete with coal policy.

Section 32 of the Mineral Lands Leasing Act of 1920, 30 U. S. C. § 189, *supra,* expressly endorses the authority of states to impose mineral severance taxes. A similar acknowledgment appears in section 601, Title VI, Power Plant and Industrial Fuel Use Act of 1978 (Pub. L. 95-620, 92 Stat. 3289), codified at 42 U. S. C. § 8401, which provides for federal financial assistance in areas suffering adverse economic consequences from coal development. In determining an impact area's need for federal assistance, the section requires that other state and local resources shall be taken into consideration, "*including severance tax revenue* . . . to the state and local governments

which are associated with the increase in coal . . . development activities . . ." *Id.* (emphasis supplied).

Congress has adopted very specific and limited means for encouraging coal development and use. The Energy Policy and Conservation Act of 1975 (Pub. L. 94-163, 89 Stat. 871) adopts incentives for development of underground coal mines, 42 U. S. C. § 6211; makes provision for export restrictions, 42 U. S. C. § 6212; and provides for the creation of strategic coal and other fossil fuel reserves, 42 U. S. C. § 6231 *et seq.*

Congressional action in other areas recognizes the continued importance of competing national policies despite their potentially adverse impact upon the production, cost and use of coal. Miners of coal, low sulfur and high sulfur alike, are neither exempt from costly environmental and strip mining regulations, see 30 U. S. C. § 1251 *et seq.*, nor from health and safety requirements under the Federal Coal Mine Health and Safety Act, 30 U. S. C. § 801 *et seq.*, even though these requirements may increase the cost of coal. The Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1201 *et seq.*, reflects a congressional preference for underground coal mining because of its limited environmental impact and demonstrates that Congress is perfectly willing to countenance an increase in the costs of coal production, in Montana and elsewhere.

Furthermore, regional economic concerns continue to predominate over any broad, unitary coal policy. For example, in the Clean Air Act Amendments of 1977 (Pub. L. 95-95, 91 Stat. 685), Congress required "application of the best technological system of continuous emission re-

duction" for all new stationary sources, including those burning low sulfur coal. 42 U. S. C. § 7411. The legislative history of this requirement reveals congressional dissatisfaction with the use of low sulfur western coal to meet air emission standards and reflects a congressional intention to (1) reduce reliance upon western coal, and (2) promote expanded use of high sulfur eastern and midwestern coal. By requiring the best technologically feasible reduction of sulfur emission with respect to low sulfur coal, Congress abolished the then prevalent practice of burning untreated low sulfur coal to meet air emission standards and thereby increased the cost of burning low sulfur coal in the hope of making eastern high sulfur coal more competitive in the market place, spurring the eastern coal economy, and reducing national reliance upon low sulfur western coal. 1977 U. S. Code Cong. & Ad. News 1245, 1510, 1575.

With a similar purpose, Congress granted state governors, the Environmental Protection Agency, and the President authority to prohibit a major fuel burning stationary source "from using fuels other than locally or regionally available coal or coal derivatives to comply with implementation plan requirements" upon a finding that such action "is necessary to prevent or minimize significant or regional economic disruption or unemployment. . . ." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 122, codified at 42 U. S. C. § 7425.[44]

---

44 See generally *The Clean Air Act Amendments of 1977: A Selective Legislative Analysis*, 13 Land & Water L. Rev. 747, 800-12 (1978).

In sum, the specific provisions of federal coal legislation define the contours of national policy in this domain. These provisions belie the existence of "a national intent to maximize the production and use of western low sulphur coal" (App. Br. 38) at the expense of other considerations. They contain no provision that even remotely reflects an intent to limit the amount of a state severance tax. Instead, as the court below properly concluded, the "basic thrust" of federal policy is to accommodate the diverse concerns of the nation, the regions, and states, even though the resulting costs including those which might be attributable to state severance taxes, may increase the price of coal.[45] See J. S. 33a-34a.

B. Under Settled Principles of Preemption Analysis, the Asserted National Policies on Which Appellants Rely Cannot, as a Matter of Law, Invalidate a State Tax.

---

45 There is no certainty that the Montana tax is or need be passed on in whole or even in part to consumers. See M. Gillis, *Severance Taxes On Energy Resources in the U. S.*, Growth and Change (Jan., 1979). Moreover, even if Congress were to limit state severance tax rates, the limitation would have little impact on the cost of coal. The tax is only a small fraction of the ultimate cost of coal generated energy. The cost of transporting coal far exceeds the amount of the tax; that cost recently drew criticism from the President's Commission on Coal, which found that the Interstate Commerce Commission had established rate guidelines allowing railroads a "7%" premium for coal traffic, a premium which is intended to "subsidize other traffic moving at less than full costs. * * *," *Staff Findings* 20 (1980). Capital costs for coal fired generators are three to five times the cost of oil and gas fired generators. President's Commission on Coal, *Coal Data Book* 54-55 (1980). Operating costs, a fair profit for the utility company, and the taxes of the consuming state must also be added.

Even assuming that it were possible to extract from the welter of statutes[46] cited by appellants a broad national policy to encourage the use of western coal and federal coal, such a policy provides no basis under established preemption doctrine for invalidating state legislation. Contrary to appellants' contention, state laws are not preempted by the "basic thrust" of a "national purpose" or "overall federal policy," App. Br. 16, 36, 39, 46-47. The Court made that point clear in *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), by summarily rejecting a contention similar to that made here, namely, that a broad, general national policy favoring "free competition" can preempt a state regulatory scheme. The claim advanced by appellants in *Exxon* was that a state statute prohibiting producers or refiners of petroleum products from operating retail service stations in the state was invalid because it interferred with a national policy favoring "free competition." Because the contention was strikingly similar to the one advanced by appellants herein, this Court's response bears quotation:

> Appellants point out . . . the . . . basic national policy favoring free competition, and argue that the Maryland statute "undermines" the competitive balance that Congress struck between the Robinson-

---

46 Appellants also rely on "official pronouncements by the President and members of his Cabinet," App. Br. 36. Whatever the import of these pronouncements, they are of scant relevance to this case. It is federal legislation, not speeches by the President or his appointees, that preempts state law. The various "official" and often irreconcilable pronouncements that emanate daily from Executive Branch personnel and shift dramatically from administration to administration, do not constitute "Laws of the United States," U. S. Const. Art. VI, cl. 2, and cannot be the basis for judicial invalidation of a state statute under the Supremacy Clause.

> Patman and Sherman Acts. This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if any adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. (437 U.S. at 133-134.)

Accord, New Motor Vehicle Board of California v. Orrin W. Fox, 439 U.S. 96, 110-11 (1978).

While the Court's preemption decisions do not lend themselves to easy generalizations, *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941), they reveal that no state law, much less a state tax law has been struck down on the basis of general national policies of the sort that underlie appellants' claim here. Findings of preemption have uniformly been predicated upon specific rights, requirements, and regulatory schemes enacted into law by Congress, or by specific administrative regulations adopted pursuant to such laws.

The cases appellants invoke for the proposition that a broad national policy may itself be the predicate for preempting a state law do not support their contention. *See Jones v. Rath Packing Co.,* 430 U.S. 519 (1977); *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967); *Hill v. Florida,* 325 U.S. 538 (1945), cited at App. Br. 39-40. Two of the cases, *Nash* and *Hill,* involved conflicts between state legislation and the National Labor Relations Act, "a comprehensive code passed by Congress

to regulate labor relations in activities affecting interstate and foreign commerce." *Nash*, 389 U. S. at 238. In each case, the state law was preempted because it interferred with a specific right conferred by Congress under this "comprehensive code."[47] No case has held that a broad national policy or aspiration may be the basis for preempting a state statute. The reference in many of this Court's preemption opinions to the "policies," "purposes," and "objectives" underlying particular statutes has never been a substitute for a determination that the enactments themselves -the "Laws of the United States," U. S. Const. Art. VI, cl. 2—would be substantially frustrated by the state legislation at issue. Interpretation of those "laws" may, of course, be influenced by the policy underlying them, but the policy itself is not a law.

The preemption issue raised by appellants was properly disposed of without a trial. Whether or not there are "Laws of the United States" with preemptive implications for coal severance taxes is a question that a court can and should resolve. The Court does not need the "testimony of regulators, administrators, and expert witnesses" (App. Br. 40-41) to resolve that issue. Indeed, appellants' claim that such testimony is necessary merely

---

47 In *Nash*, it was the right of an employee to file an unfair labor practice complaint that was infringed by a state statute which denied unemployment benefits to persons exercising such right. In *Hill*, it was the right of employees to select their own collective bargaining agents which was curtailed by the state statute requiring licensure of union business agents and prohibiting new citizens and convicted felons from acting as collective bargaining agents. In *Jones*, federal standardized product labeling requirements were held to preempt state labeling requirements based upon different standards.

reflects their mistaken belief that such matters as a former Energy Secretary's remarks before a trade association bears on whether Montana's coal severance tax is contrary to "the Supreme Law of the Land." See App. Br. 36, n.** Nor does the question of whether a broad national policy can be used as the basis for preempting a state law require a trial. This is clearly an issue of law which a Court may properly dispose of upon a motion to dismiss, see *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U.S. 54, 57 (1938) and was treated as such by the Court in *Exxon, supra.*[48]

C. A Proper Appreciation of the Central Role of State Tax Power in the Federal System Precludes Preemption of a State Tax Solely on the Ground that the Increased Costs Associated with the Tax Indirectly Affect Implementation of Federal Policies.

Assuming that the existence of a broad national policy to encourage the production of western coal or of some unarticulated compromise in the Mineral Lands Leasing Act (App. Br. 46) could form the predicate for a preemption claim, appellants' case boils down to the proposition that a state tax may be preempted because of the indirect economic impact that the amount of the tax may have upon some federally favored activity. No state tax has ever been invalidated on this basis, and an

---

48 The State would agree with appellants that a trial would be necessary to resolve the issue whether Montana's tax frustrates a national policy to encourage the use of western coal if the Court determines as a matter of law that there is such a policy and that such a policy can form the basis of a preemption claim.

appreciation of the central role of state tax power in the federal system suggests that no state tax should be.

As this Court has always recognized, the states' "power of taxation is indispensable to their existence," *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 199 (1824), and thus to the federal scheme that the framers created, *see e.g., The Federalist* No. 32 (A. Hamilton). Moreover, the exercise of state tax power has traditionally been regarded as compatible with the exercise of federal power. See *Gibbons,* 22 U.S. (9 Wheat.) at 199. Just last term the Court observed that "concurrent federal and state taxation of income, or course, is a well-established norm." *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 448 (1980). Furthermore, while a state tax may increase the costs of engaging in particular activity, unlike a state regulation, it prescribes no mode of conduct in an area in which Congress may have adopted rules of its own.

For these reasons, the economic burden imposed by a state tax should not, in and of itself, be a basis for federal preemption of state tax legislation. Every tax, after all, imposes increased costs on the person, property, or activity subject to the levy. *Union Pacific R.R. Co. v. Peniston,* 85 U.S. 5, 30-31 (1873) and see *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,* 318 U.S. 261, 275 (1943). Elementary economics teaches that such costs may reduce the demand for the goods or services taxed, and to that extent any state tax arguably threatens to "frustrate" federal law. Yet to allow such "frustration" to be a basis for preemption of a state tax is wholly inconsistent with the Court's recognition that state tax power is critical to the states' independent

existence and is generally compatible with concurrent exercises of federal power.

The Court's preemption decisions involving state taxation have never recognized the contention which appellants advance here, and indeed have consistently rejected it when presented. *E.g., Union Pacific R.R. Co. v. Peniston, supra.* Moreover, with one exception, this Court has invalidated a state tax on preemption grounds only where the tax was directed at the federal government itself, its instrumentalities, or its special wards, the Indian Tribes. *See, e.g., McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819) and other cases cited by appellants at App. Br. 41. These cases involve considerations distinct from those encountered in the usual preemption controversy and provide little guidance for preemption analysis generally. *White Mountain Apache Tribe v. Bracker,* 100 S. Ct. 2578, 2583 (1980);[49] L. Tribe, *American Constitutional Law* 391-400 (1977). The single case in which the Court invalidated a state tax on general preemption grounds was *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 414 (1940), where the Court struck down a state tax upon sales of imported fuel which had been delivered as ships' stores to vessels engaged in foreign commerce. Two critical factors readily distinguish the controversy there from the instant case. First, Congress itself had withdrawn the fuel in question from federal taxation, 309 U.S. at 423, and second, the case involved foreign commerce, an

---

49 The Court in *White Mountain* observed: "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." 100 S. Ct. at 2583.

area in which the primacy of federal interests warrants special consideration that may override state legislation that is otherwise unobjectionable. *Japan Lines, Ltd. v. County of Los Angeles,* 441 U.S. 434, 444-51 (1979). *McGoldrick* does, however, share one characteristic with other preemption cases involving state taxes which serves to distinguish it from the instant controversy: There was no suggestion that the rate of the tax figured in the Court's determination that it was inconsistent with federal legislation.

CONCLUSION

For the reasons set forth above, the judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

MIKE GREELY
Attorney General
Counsel of Record

MIKE McGRATH
Assistant Attorney General

MIKE McCARTER
Assistant Attorney General

Office of the Attorney General
State of Montana
State Capitol
Helena, Montana 59601

OF COUNSEL:

A. RAYMOND RANDOLPH, JR.
Sharp, Randolph & Green

Suite 501
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Attorneys for Appellees

February, 1981

Office Supreme Court, U.S.
FILED
MAR 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, ELLEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MORRIS L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF OF APPELLANTS

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant
Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant
Westmoreland Resources, Inc.

March, 1981

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
ANNE E. FONTAINE
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
THOMAS A. BUDEWITZ
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants
except Western Energy Company

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. THE SEVERANCE TAX IS NOT IMMUNE FROM SCRUTINY UNDER AN APPROPRIATE COMMERCE CLAUSE TEST 2

II. THE COMMERCE CLAUSE CLAIM REQUIRES RESOLUTION OF FACTUAL QUESTIONS 3

A. Whether A State Tax Is "Fairly Related To The Services Provided By The State" Raises Triable Issues Of Fact 3

B. Plaintiffs' Claim That The Tax "Discriminates Against Interstate Commerce" States A Valid Claim and Raises Triable Issues .. 10

III. THE TAX SUBSTANTIALLY FRUSTRATES FEDERAL ENERGY STATUTES . 12

IV. THE TAX SUBSTANTIALLY FRUSTRATES THE MINERAL LANDS LEASING ACT 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases PAGE

Baker v. *Carr*, 369 U.S. 186 (1962) 10

Bibb v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959)..... 9

Boston Stock Exchange v. *State Tax Commission*, 429 U.S. 318 (1977)..... 3

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937) 6

City of Pittsburgh v. *Alco Parking Corp.*, 417 U.S. 369 (1974) 5, 6

Colegrove v. *Green*, 328 U.S. 549 (1946) 10

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977)..... 3, 6

DeCanas v. *Bica*, 424 U.S. 351 (1976)..... 14

Exxon Corp. v. *Wisconsin Department of Revenue*, 100 S. Ct. 2109 (1980) 4

Floral Park Tenants Association v. *Project Holding, Inc.*, 152 N.J. Super. 582, 378 A.2d 266 (Ch. Div. 1977), *aff'd per curiam on other grounds sub nom. Project Holding, Inc.* v. *Smyth*, 166 N.J. Super. 354, 399 A.2d 1033 (Super. Ct. App. Div. 1979) 16

General Motors Corp. v. *Washington*, 377 U.S. 436 (1964)..... 4

H.P. Hood & Sons, Inc. v. *Du Mond*, 336 U.S. 525 (1949)..... 7

PAGE

Heisler v. *Thomas Colliery Co.*, 260 U.S. 245 (1922) 2

Hill v. *Florida*, 325 U.S. 538 (1945) 14, 15

Hines v. *Davidowitz*, 312 U.S. 52 (1942) 12

Illinois Central Railroad Co. v. *Minnesota*, 309 U.S. 157 (1940) 4

Ingels v. *Morf*, 300 U.S. 290 (1937) 3, 4, 6

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) 4

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) ..12, 15

Mid-Northern Co. v. *Montana*, 268 U.S. 45 (1925) 17

Minnesota v. *Clover Leaf Creamery Company*, 49 U.S.L.W. 4111 (Jan. 21, 1981) 9

Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967) 15

Oklahoma Tax Commission v. *Texas*, 336 U.S. 342 (1948) 16

Perez v. *Campbell*, 402 U.S. 637 (1971) 12, 16

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) 12

Raymond Motor Transport, Inc. v. *Rice*, 434 U.S. 429 (1978) 9

Reynolds v. *Sims*, 377 U.S. 533 (1964) 8

Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) 9

Ventura County v. *Gulf Oil Corp.*, 601 F.2d 1080, *aff'd*, 445 U.S. 947 (1980) 14, 17

PAGE

Washington Revenue Department v. *Stevedoring Association*, 435 U.S. 734 (1978) 3, 5

White Mountain Apache Tribe v. *Bracker*, 100 S.Ct. 2578 (1980) 14-16

Constitutions, Statutes & Regulations

Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437 17

Ch. 85, § 32, 41 Stat. 450, 30 U.S.C. § 189 (1976) 2, 17, 18

National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449, 29 U.S.C. § 151 *et seq.* (1976) 15

§ 1, 49 Stat. 449-50, 29 U.S.C. § 151 15

Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.* 12

§ 601(a)(2), 92 Stat. 3323, 42 U.S.C. (Supp. III 1979) § 8401(a)(2) 13

Legislative History

123 Cong. Rec. 27195 (1977) (remarks of Sen. Randolph), *reprinted in* III U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act of 1978* (June 1979) 13

122 Cong. Rec. 495, 520 (1976) (remarks of Rep. Howe) 18

122 Cong. Rec. 515 (1976) (remarks of Rep. Mink) 18

53 Cong. Rec. 1122 (1916)..... 18

PAGE

Other Authorities

Boom in Strip Mining: Windfall for Montana, Washington Post, May 22, 1977 1

Coal Severance Tax: Hearings Before the Committee on Energy and Natural Resources, United States Senate, on S. 2695 (August 6, 1980) (Pub. No. 96-143)..... 10

Coal Severance Taxes: Hearings Before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 6625, H.R. 6654 and H.R. 7163 (March 21 and June 5, 1980) (Serial No. 96-173)..... 7

W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245 (1979)..... 11

Towe, *Explanation of Reasons for Montana's Coal Tax*..... 11

Transcript of the Joint Conference on Energy on the Powerplant and Industrial Fuel Use Act (November 9, 1977), *reprinted in* II U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act of 1978* (June 1979). 13

L. Tribe, *American Constitutional Law* (1978) 14

U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act of 1978* (June 1979) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, *et al.*,

Appellants,

—against—

STATE OF MONTANA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Montana asserts that the states possess an unfettered power to tax, free from any constitutional restraint or scrutiny. Significantly, Montana fails to acknowledge or defend the practical consequences of this position—that it may impose a severance tax in any amount no matter how high, notwithstanding the undue burden such a tax may cast on interstate commerce.

Despite a number of vague references—none with record support—concerning the sort of governmental costs which might justify severance taxes, this case does not involve any rough correspondence between such costs and this tax. It does involve an attempt by one state, fortuitously endowed with a vital natural resource, most of it federally owned, to use its taxing power to shift literally billions of dollars to its coffers from consumers in other states. From this posture, Montanans have accurately portrayed themselves as the "blue-eyed Arabs."[1] One

1 A characterization employed by then-Governor Judge in describing Montana's coal windfall. *Boom in Strip Mining: Windfall for Montana*, Washington Post, May 22, 1977, at 1.

consequence of acquiescing in Montana's position would be the Balkanization of this nation over access to necessary energy resources. Significantly, Montana offers no response to this assertion either.

In plaintiffs' view, both the negative implications of the Commerce Clause and the affirmative force of existing federal legislation ultimately restrain the power of the states to collect taxes such as Montana's.[2] If that be so—if there is any federal principle limiting such state power—this case should be reversed and remanded for trial.

ARGUMENT

I. THE SEVERANCE TAX IS NOT IMMUNE FROM SCRUTINY UNDER AN APPROPRIATE COMMERCE CLAUSE TEST

Montana has few supporters, even among those who ultimately support the tax here, for its view that the scope of the Commerce Clause continues to be limited by *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922). Its arguments have been fully answered in our opening brief. It is clear that both the United States and the states supporting Montana concede that the Clause may be used as a vehicle to examine, and to limit, this state tax. As the Solicitor General put it (Brief for the United States at 22):

> [W]e agree with Appellants . . . that Montana's Severance Tax is not altogether immune from Commerce Clause scrutiny on the theory that mining is a purely 'local' activity.

The briefs submitted by virtually all of the *amici*, even those opposing our position, are in accord with this view.[3]

---

2 Montana's spurious, and newly raised, claim that Section 32 of the Mineral Lands Leasing Act of 1920 (41 Stat. 450, 30 U.S.C. § 189 (1976)) shows an intent to grant unfettered discretion to tax to the states is dispelled at page 17, *infra*.

3 *E.g.*, Brief of the States of Wyoming, Colorado, Nevada, Idaho, Washington, and Oregon at 6. North Dakota and West Virginia did not

(Footnote continued)

II. THE COMMERCE CLAUSE CLAIM REQUIRES RESOLUTION OF FACTUAL QUESTIONS

If, then, Montana's tax may be measured under substantive Commerce Clause tests, there is no dispute that the standards of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 (1977), are pertinent here. There is, however, substantial disagreement as to the meaning and application of two of its tests—whether the tax is "fairly related" to the benefits and protection provided by the State, and whether it discriminates against interstate commerce. These are the central disputed questions before the Court.

A. Whether A State Tax Is "Fairly Related To The Services Provided By The State" Raises Triable Issues Of Fact

While no case here has considered the question directly, the "fairly related" test has clear roots in a factual inquiry. This Court has stated repeatedly that the *Complete Auto* tests are focused on the "practical effects" of the tax in question, not on labels or artificial rules. Where taxes are "tailored," as this tax is, the Commerce Clause requires "special scrutiny." *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 288-89 n.15. The "fairly related" test itself is expressly derived from *Ingels* v. *Morf,* 300 U.S. 290 (1937), in which a state tax was held invalid because a factual analysis showed it was excessive in relation to the governmental burdens imposed by the activity. *See Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 278 n.6.[4] *Washington Revenue Department* v.

(Footnote continued)

specifically address the issue, but adopted these views by reference. *See* Brief of North Dakota and West Virginia at 4 n.3. Arizona also adopted the Wyoming Brief by reference in its motion for leave to appear as *amicus*.

4 Each of the four principal cases cited in that note appears to support one of the four prongs of the test, standing, respectively, for discrimination (*Boston Stock Exchange* v. *State Tax Commission*, 429

(Footnote continued)

Stevedoring Association, 435 U.S. 734, 748 (1978), underscored the necessity for examining the facts:

> *Complete Auto* recognized that a state has a significant interest in exacting from interstate commerce its fair share of the cost of state government. . . . All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity. [Citations omitted].

Neither Montana nor the *amici* supporting it satisfactorily explain how the Court can give "special scrutiny" to the "practical effects" of this tax, or determine whether it exacts "more than a just share," without a factual inquiry at a trial.

For its part, Montana takes the view (Brief of Appellees at 22-27) that the test is satisfied whenever a state provides the benefits of a civilized society, a standard which could be met in any case and under any circumstances, thus vitiating the test entirely, notwithstanding the required scrutiny of the "practical effects" of any tax. (*See* Brief of Appellants at 29-31).[5] We do not believe that this Court has created and reiterated a meaningless test, nor do we see how any such contention squares with the commitment to give "tailored" taxes "special scrutiny". Neither of the cases on which Montana relies (Brief of Appellees at 26)[6] for this position so held, nor was the

---

(Footnote continued)

U.S. 318 (1977)); nexus (*General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964)); apportionment (*Illinois Cent. R. Co.* v. *Minnesota*, 309 U.S. 157 (1940)); and fair relation (*Ingels* v. *Morf*, 300 U.S. 290 (1937)).

5 This is not to say that Montana misses any opportunity to present its version of facts which might justify severance taxes in some circumstances, thus attempting to have whatever benefits a factual record might provide without the burden of discovery—which was stayed at the outset of the case—or of permitting plaintiffs to prove their side of the case at a trial.

6 *See Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 100 S. Ct. 2109, 2122 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979).

issue whether the test raised factual questions determined.[7]

Most of our opponents here, including Montana, fail to respond to the point that any construction of this test which avoids factual inquiries renders the test meaningless. Those who do, give responses which are as varied as they are unconvincing.[8]

---

7 In his concurring opinion in *Washington Revenue Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 764 (1978), Justice Powell remarked that the Court's conclusion concerning the record in the case "cannot be questioned." It strains credulity to argue, as Montana does (Brief of Appellees at 25-26), that this means that he would bar proof on this issue in all future cases. *Compare City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 379 (1974) (Powell, J. concurring), where Justice Powell states, in an analogous context, that the Court's decision should *not* be read as barring proof in future cases.

8 Some *amici*, while agreeing that "the total impact costs of coal extraction activity are the proper constitutional boundary for Montana's Severance Tax," argue that this determination is to be made by some procedure short of a trial. (*See* Brief of Environmental Defense Fund, *et al.* at 4-7). Others appear to agree that the issue is one of fact, and attempt to justify the tax by existing or impending impact costs. (*See* Brief of Wyoming, *et al.* at 12-16). If such justifications exist, they remain to be shown in this case. Plaintiffs have alleged—and should be given the opportunity to prove—that no such justification exists here, either with respect to direct "impact costs" or with respect to any other costs—present or future—which Montana could legitimately claim. That is clearly an issue for trial.

Montana suggests (Brief of Appellees at 27), and several *amici* assert (*e.g.*, Brief of the Environmental Defense Fund, *et al.* at 8-10), that the tax is justifiable because the state may, in the future, face costs arising from "unknown" and unquantifiable environmental degradation or social costs. This, too, renders the test meaningless since such nebulous assertions are not susceptible to proof. Plaintiffs recognize the risks of environmental degradation and social costs associated with coal mining but, as a factual matter, strongly dispute the proposition that these risks are limitless and, as a legal matter, strongly dispute the proposition that the shibboleth of "unknown risk" should be substituted for reasoned factual analysis. This is a trial issue as well.

We are also told that "Montana is wisely setting aside in trust a part of its severance taxes so that future generations will not have to bear the cost of these burdens. . . . " (Brief of Appellees at 27 n.31). This

(Footnote continued)

The Solicitor General, apparently recognizing that Montana's approach leads only to the conclusion that the fairly related test is an "empty" one, erases the test in another way. His brief asserts that the "fairly related" test is simply an elaboration of the "nexus" or "apportionment" branches of the *Complete Auto* standard and that it is satisfied whenever the "measure" of a tax is related to the taxpayers' activity within the taxing jurisdiction, without regard to the "amount" of the tax or the "value" of the services and protection provided by the state. (Brief for the United States at 28-31). While this suggestion is linguistically ingenious, it simply underscores our position since it altogether fails to meet the serious objection that it, too, renders the test meaningless.[9] It takes little imagination to see that if a legislature is constrained simply to "measure" a tax by the value of the taxpayer's activity, but is free to set any tax rate it chooses—for example, 30% or 1,000% or 2,000%, to use the rates mentioned in this proceeding—it is not constrained at all. In the end, the Solicitor General's construction of the *Complete Auto* test, like the construction proposed by Montana, is no test at all.

In this connection, cases decided under the Due Process Clause[10] are of little relevance, since the purposes of the

---

(Footnote continued)

statement simply masks the truth—the Constitutional Trust, expected to accumulate several billions of dollars by the end of the century, bears no relation at all to any present or future costs. Whether it is "wise" depends on whether one expects to be a forced donor or a grateful beneficiary.

9 The Government's view is apparently based, in part, on a misapprehension of the origin of the test, which its brief attributes to "*General Motors, J.C. Penney*, and similar cases. *See* [*Complete Auto Transit, Inc.* v. *Brady*,] 430 U.S. at 279 n.8." (Brief for the United States at 28). But, as noted above (page 4), the fair share test actually traces its origins to *Ingels* v. *Morf*, 300 U.S. 290 (1937).

10 Montana refers to *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937), and other cases. (*See* Brief of Appellees at 24-25). Our observations are equally pertinent to *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 368 (1974), to which several *amici* refer. Neither involved interstate commerce.

Due Process and Commerce Clauses differ and the judicial standards necessary to their protection differ accordingly. State legislation which passes muster under the Due Process Clause may nevertheless violate the Commerce Clause. *E.g.*, *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 533-34 (1949). The special role of the Commerce Clause in our federal system (*see id.* at 532, *et seq.*) has led the Court to its "special scrutiny" rule where the dangers of localism are apparent and where normal political checks and balances are likely to fail. (*See* Brief of Appellants at 27-28). Concepts of due process may not require any "fair relation" test; but, as this Court has repeatedly said, the Commerce Clause does impose such a standard.

Montana also objects to application of the "fairly related" test by attacking the competence of the courts to apply it, urging that enforcement of the test would burden the courts with additional complicated litigation which Montana believes ought to be left, in the end, to the legislative branch. We believe that all of these arguments reflect a misperception of the nature of the "fair relation" test, and of the respective roles of our courts and legislative bodies.

Contrary to several suggestions in the briefs of our adversaries and opposing *amici*, plaintiffs have never maintained that this or any other court should calculate an appropriate rate of tax.[11] In our view, that burden

---

11 We wish to correct a misapprehension which may arise from a statement of the Montana Supreme Court that plaintiffs conceded that a tax of "perhaps twelve and a half to fifteen percent of the value of the coai" could be justified. (Opinion 7; Apdx. 9a). (*See* Brief of Appellees at 9 n.13). These figures were simply speculation on the part of plaintiffs' counsel at oral argument—not a substantive concession—following counsels' repeated insistence that the question could only be determined after trial. Plaintiffs have also supported bills in Congress to limit coal severance taxes nationwide to 12.5%, saying that that amount "more than takes care of any needs that any State could have." *Coal Severance Taxes, Hearings Before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign*

(Footnote continued)

falls, in the first instance, on the appropriate state legislatures. The question properly brought before a court is not whether the rate, itself, is correct, but whether there is some reasonable basis, founded on the needs of the state arising from the activities of the taxpayer, to support the amount of the tax. It is a particularly pertinent question where, as here, the subject of the tax has been narrowly drawn, directed to a specific activity—here, coal mining—and carefully selected to fall outside the taxing state. In such circumstances, we believe it is appropriate for the courts, *inter alia*, to examine whether the legislature had a reasonable basis for what it did; to review what studies it made and what justifications it found for the tax; whether the specific activity selected to tax in fact added to governmental costs and the extent thereof; whether the proceeds are being used for such added costs; whether they are in substantial part being cached away, in effect, for unrelated and unknown purposes—all to the end that a determination can be made as to whether the tax is fairly related to the benefits provided. In so doing, far from usurping any legislative function, the courts are carrying out their appropriate judicial responsibility.[12]

(Footnote continued)

Commerce, House of Representatives, on H.R. 6625, H.R. 6654 and H.R. 7163 (March 21 and June 5, 1980) (Serial No. 96-173) at 94. Plaintiffs would hope to show—and have solid basis for believing—that no such figure is actually justified. (*See* Brief of Appellants at 12).

12 Montana and several *amici* also raise the contention, familiar when any novel question is presented, that a decision in plaintiffs' favor will open the floodgates to similar suits. This, of course, is hardly an answer to an invasion of constitutional rights. *See Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964). But, in any event, the suggestion lacks merit. This case is distinguished by (i) the grossly excessive nature of the tax and (ii) the relative rarity of the circumstances which gave rise to it. This is not a general tax measure of the sort typically subject to widespread opposition in the taxing jurisdiction. The tax falls on a specific activity, the mining of coal, uniquely suited to exportation of the tax burden. In these circumstances, it is unreasonable to suggest that application of constitutional principles to this situation will lead to a surge in tax litigation.

(Footnote continued)

State legislatures must have substantial latitude to adopt tax measures to generate necessary revenues, but their discretion must be exercised within constitutional bounds. Where—as here—a state legislature manifestly overreaches, this Court has repeatedly recognized that the "negative implications" of the Commerce Clause require the courts to impose judicial restraints:

> [T]he commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and . . . in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, 769 (1945). *See also Minnesota* v. *Clover Leaf Creamery Company*, 49 U.S.L.W. 4111, 4115 (Jan. 21, 1981); *Raymond Motor Transport, Inc.* v. *Rice*, 434 U.S. 429, 442-44 (1978); *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 529-30 (1959).

Montana and others also argue that this matter ought to be left to Congress. The vigor with which they make this argument here is matched only by the enthusiasm with which they argued in Congress that the matter ought to be left to the courts,[13] and by the arguments of certain

---

(Footnote continued)

Some *amici* have suggested that the "fair relation" test should not be applied here because it would give a windfall to plaintiffs. (*See* Brief of The Western Conference of The Council of State Governments at 24-25). This is not true. Just as they are permitted to pass tax increases through, plaintiffs are obligated to return tax savings to their customers, the ultimate consumers.

13 In testimony before the United States Senate just a few months ago, then-Governor Judge of Montana took the view that:

> The reasonableness of the [Montana Coal Severance] tax will be decided probably in the Supreme Court.
>
> * * * * *
>
> There you will decide on the reasonableness or the burden on interstate commerce and *that is a question most properly left to the*

(Footnote continued)

members of Congress, appearing here as *amici*, that the matter should be left to the state legislatures.[14]

The short answer is that Congress, the state legislatures, and the courts all have a proper role to play. Whether or not Congress may ultimately act to restrain a burden on commerce by a state serves as no basis for the argument that this Court should abdicate its responsibilities under the Commerce Clause and should refrain from construing the Constitution in the case presented to it here. *Compare Baker* v. *Carr*, 369 U.S. 186, 226 (1961) *with Colegrove* v. *Green*, 328 U.S. 549, 552 (1946). In the end, Congress cannot be expected to anticipate and expressly prohibit every abuse which may unduly burden interstate commerce.

B. Plaintiffs' Claim That The Tax "Discriminates Against Interstate Commerce" States A Valid Claim And Raises Triable Issues

Montana is in a position to exact a levy on an energy resource fortuitously located in that State, substantially

---

(Footnote continued)

court and not determined by a committee of the United States Senate.

Coal Severance Tax: Hearings Before the Committee on Energy and Natural Resources, United States Senate, on S. 2695 (August 6, 1980) (Pub. No. 96-143) at 237 [hereinafter cited as "Hearings"]. (Emphasis supplied).

Governor Herschler of Wyoming testified similarly that the matter "should be determined by the United States Supreme Court. . . ." Hearings at 208.

Congressman Cheney of Wyoming also said:

> [I]t seems prudent to leave resolution of this flexible boundary to the courts, which have historically resolved such disputes in a case-by-case manner. . . .

Id. at 155. *Compare* his position here, that these "are political questions for the state legislature and beyond the institutional competence of the federal judiciary." (Brief of Wyoming Congressmen at 1).

14 *See* Brief of Hon. Max Baucus, *et al.* at 4-5; Brief of Wyoming Congressmen.

all of which may be passed on to out-of-state consumers. Plaintiffs' theory of discrimination arises from the premise that Montana selected coal as the subject of this extraordinary tax *because* taxing that commodity effectively selected out-of-state taxpayers to shoulder a tax burden grossly in excess of any costs imposed directly or indirectly by such taxpayers on the State.

The sponsor of the tax made the Montana Legislature aware, at the time it passed the tax, that long-term coal contracts would pass the tax on to ultimate consumers outside the State:

> In other words, the local companies simply add the additional taxes to their bill, and the *entire cost* is passed on to the purchasers in the Midwest or elsewhere.

Towe, *Explanation of Reasons for Montana's Coal Tax* 4. (Emphasis supplied).

A leading commentator urges that plaintiffs' theory of discrimination in the present form has "considerable force," noting:

> [O]ne may fairly contend that the State's effective selection of a class of out-of-state taxpayers to shoulder a tax burden grossly in excess of any costs imposed directly or indirectly by such taxpayers on the State places an unconstitutional burden upon interstate commerce.

W. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat. Tax J. 245, 249 (1979).

Discrimination has many guises. It does not serve the salutary purpose of the Commerce Clause to limit its application to cases of blatant facial discrimination. Result-oriented tax policies may be just as effective in shifting tax burdens to non-residents as adoption of patently discriminatory rates. Proof of this effect presents no difficulty in this case. The bulk of present day Montana coal production—approximately 97% in 1980—derives from contracts entered into *before* adoption of the tax. (*See* Complaint ¶ 13; Apdx. 51a-52a). Not less than

90% of total tax payments have been shifted out of state in the manner contrived by the Montana Legislature.

The Solicitor General argues that the Commerce Clause was intended to create a "national Common Market" and "area of free trade" under which "the borders between states are essentially irrelevant." (Brief for the United States at 24). We agree, but the asserted application of that truism here turns the constitutional principle upside down. As we have shown, the Montana Legislature very carefully made the borders "relevant" by ascertaining that the principal burden of this tax would fall beyond its boundaries. In doing this, it unconstitutionally discriminated against interstate commerce.

III. THE TAX SUBSTANTIALLY FRUSTRATES FEDERAL ENERGY STATUTES

Montana does not squarely meet our claim that any state legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law" is invalid under the Supremacy Clause. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977), *quoting Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971). Instead, defendants argue that national policies cannot preempt state laws (Brief of Appellees at 39-43), and in so doing completely ignore the numerous federal statutes which are the basis of plaintiffs' preemption claim (*see* Brief of Appellants at 5n.*).[15] Plaintiffs do not claim that the Coal Severance Tax is preempted by a "national

---

15 The Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III 1979) §§ 8301 *et seq.* ("Fuel Use Act"), is but one clear example. It expressly states in its preamble that one of its purposes is to encourage the greater use of coal, and in fact specifically *mandates* the use of coal in lieu of oil and natural gas in some instances. (*See* Brief of Appellants at 36-37; Brief for the United States at 15-17).

policy", by itself, but by a series of federal laws, all reflecting the same national policy, which were designed to encourage the production and use of coal, and that these statutes have preemptive effect.

The Solicitor General—and virtually all of the opposing *amici* that have submitted their views to this Court[16]—are more realistic than Montana, agreeing with plaintiffs that a number of federal statutes reflect a national policy which favors the increased production and use of coal—including Western coal. They argue, however, that these federal statutes do not preempt the Coal Severance Tax because they do not reflect a Congressional intent to preempt state severance taxes or specifically, by their terms, limit the State's right to tax. (*See, e.g.*, Brief for the United States at 18-19; *see also* Brief of Appellees at 36, 39).[17]

---

16 *See, e.g.*, Brief for the United States at 15; Brief of Wyoming, *et al.* at 19; Brief of North Dakota and West Virginia at 7. *See generally* Brief of Appellants at 35-41; Brief of Texas at 4-12; Brief of New Jersey, *et al.* at 4; Brief of Hon. Robert W. Edgar, *et al.* at 2; Brief of Kansas at 10-11.

17 Section 601(a)(2) of the Fuel Use Act, 92 Stat. 3323, 42 U.S.C. (Supp. III 1979) § 8401, is essentially irrelevant to the issue here. The central purpose of the Act is plainly to promote the use of coal. In considering the impact of that policy, Congress balanced those instances in which impact aid would be necessary to meet legitimate, energy-related costs against the proposition that those costs should not be the occasion of a windfall. *See* Transcript of the Joint Conference on Energy on the Powerplant and Industrial Fuel Use Act (Nov. 9, 1977) at 1869, 1878 [hereinafter cited as "Joint Conference Transcript"], *reprinted in* II U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act of 1978*, at 2-823, 2-832 (1978) [hereinafter cited as *"Legislative History"*]; Joint Conference Transcript at 1819, 1822, *reprinted in* II *Legislative History* at 2-774, 2-777; 123 Cong. Rec. 27915 (1977) (remarks of Sen. Randolph), *reprinted in* III *Legislative History* at 3-52. *See also* Joint Conference Transcript at 1824, 1833, 1852, 1853, *reprinted in* II *Legislative History* at 2-779, 2-788, 2-807, 2-808. It cannot fairly be said that Congress gave any attention at all to the proposition that state taxes could, in fact, frustrate the central purpose of the Act.

But arguments relating to "express preemption" and "Congressional intent" simply divert attention from the claims before the Court. (*See* Brief for the United States at 18-19). The Compiaints here assert that there is an actual conflict between the tax and the objectives of federal law. Such a claim is valid. As the Court stated in *DeCanas* v. *Bica*, 424 U.S. 351, 357 n.5 (1976):

> [E]ven absent . . . a manifestation of congressional intent . . . the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws. . . .

Accord, *White Mountain Apache Tribe* v. *Bracker*, 100 S. Ct. 2578, 2587-88 (1980); *Ventura County* v. *Gulf Oil Corp.*, 445 U.S. 947 (1980), *aff'g* 601 F.2d 1080, 1086 (9th Cir. 1979). As Professor Tribe put it:

> Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, *state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage.*

L. Tribe, *American Constitutional Law* § 6-24 at 378 (1978). (Emphasis supplied).

It is no objection to a claim of preemption that the Congressional statement of purpose appears in a preamble, rather than in the implementing sections of the statute.[18] *E.g.*, *Hill* v. *Florida*, 325 U.S. 538 (1945). There the Court found a conflict between the purpose of Congress expressed in the "Findings and Policy" of a statutory preamble and a Florida statute requiring a union's

---

18 The cases cited by the Solicitor General (Brief for the United States at 15-16 n.10) are not to the contrary. None of those cases addressed the question whether state legislation was preempted when it frustrated the fulfillment of Congressional policies and objectives as expressed in statutory preambles.

business agent to obtain a license.[19] *Id.* at 541. No particular substantive section of the federal statute prohibited such state laws, but the Court nevertheless held that the state law was invalid because it "stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the preamble. *Id.* at 542. *Accord*, *White Mountain Apache Tribe* v. *Bracker*, 100 S. Ct. 2578 (1980); *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967).

Nor is it an objection to such a claim that the conflict between state and federal law does not appear in a head-to-head way on the face of the statute. The question is, does the state law, in practical effect, "substantially frustrate" the purposes and objectives of Congress. *E.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-43 (1977); *Nash* v. *Florida Industrial Commission*, *supra*, 389 U.S. at 239; *Hill* v. *Florida*, *supra*, 325 U.S. at 542-43. (*See* Brief of Appellants at 41-45). Montana's attempt to distinguish the cases so holding misses the point. (*See* Brief of Appellees at 41-42). The simple fact remains that the state statutes at issue in those cases were preempted without any showing that Congress expressed an intent to preempt or of a direct head-to-head conflict between the particular provisions of the state and federal statutes. Substantial frustration of the purposes and objectives of the federal law is enough.

Significantly, defendants now admit that a trial is necessary to resolve the substantial frustration issue if the Court determines (1) that there is a policy to favor Western coal, and (2) that such a policy can form the basis of a preemption claim. (Brief of Appellees at 43 n.48). Plaintiffs have met that standard and are accord-

---

19 The purpose of the National Labor Relations Act was "to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice." 325 U.S. at 541. *See* 49 Stat. 449-50(§ 1), 29 U.S.C. § 151 (1976).

ingly entitled to a trial to prove their claims that the Montana Coal Severance Tax has had, and continues to have, the effect of frustrating national energy policy by discouraging the production and use of coal, and particularly of Western, low-sulphur coal. (*See* Brief of Appellants at 45). This is necessarily a matter of degree, depending in part on the rate of the tax and the degree to which it interferes with federal purposes. *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 363-64 (1948). The Solicitor General specifically recognizes "the potential for the Montana tax to slow the increase in the use of coal"[20] (Brief for the United States at 15), and states that it is "conceivable" for frustration to occur (*id.* at 17). Only a full factual record can illuminate that question. Plaintiffs should not have been denied an opportunity to prove their claim.[21]

---

20 *White Mountain Apache Tribe* v. *Bracker*, 100 S. Ct. 2578, 2587 (1980), expressly used the economic burden created by taxes as a basis for holding that the taxes were invalid because they "adversely affect[ed] the Tribe's ability to comply with the standard-yield management *policies* imposed by federal law." (Emphasis supplied). Thus, Montana's bald assertion (Brief of Appellees at 43) that "[n]o state tax has ever been invalidated" "because of the indirect economic impact that the amount of the tax may have" is plainly wrong. *See also Floral Park Tenants Ass'n* v. *Project Holding, Inc.*, 152 N.J. Super. 582, 378 A.2d 266, 275 (Ch. Div. 1977), *aff'd per curiam on other grounds sub nom. Project Holding, Inc.* v. *Smyth*, 166 N.J. Super. 354, 399 A.2d 1033 (Super. Ct. App. Div. 1979).

21 Defendants cite no case in this Court, or any other court, in which a substantial frustration claim was dismissed for failure to state a claim upon which relief could be granted, and we know of no such case. *Cf. Perez* v. *Campbell*, 402 U.S. 637 (1971). To the contrary, every case alleging "substantial frustration" cited by defendants or the court below—except those summarily finding preemption—was decided after trial, or, at least, after the plaintiff had had an opportunity to make a factual record.

IV. THE TAX SUBSTANTIALLY FRUSTRATES THE MINERAL LANDS LEASING ACT

Montana invokes Section 32 of the Mineral Lands Leasing Act, 30 U.S.C. § 189 (the "1920 Act"), to argue (i) that it deprives the 1920 Act of preemptive effect with respect to its central purposes, and (ii) that it "constitutes nothing less than Congressional permission for the state to enact the type of taxing measure at issue in this case." (Brief of Appellees at 10). The Solicitor General has joined in the first contention, but not the second. Both contentions should be rejected.

For purposes of this case, Section 32 is essentially neutral: "[T]he proviso [in Section 32] cannot give authority to the state which it does not already possess. . . ." *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980). The Act simply preserves the rights of the states "to exercise any rights which they may have" with respect to this vital national resource. 30 U.S.C. § 189. Section 32 was correctly construed by this Court shortly after its enactment to permit "any form of state taxation *otherwise lawful*." *Mid-Northern Oil Co.* v. *Montana*, 268 U.S. 45, 50 (1925). (Emphasis supplied). Montana's power is obviously subject to constitutional scrutiny and other relevant legislation. The italicized caveat vitiates Montana's argument that this Section granted it a power to tax without limit.

Montana's argument (Brief of Appellees at 12-15) that the legislative history of Section 32 manifests an intent to bestow on Montana an unlimited power to tax is invalid. The portions of "legislative history" on which Montana principally relies (Brief of Appellees at 12) relate to an early version of the Act which contained no proviso of the type later incorporated in Section 32. Representative Lenroot was speaking in 1914. No provision in any way

comparable to Section 32 even appeared until 1916—some two years after the cited debate.

In its original form, Section 32 stated that "nothing in the act shall be construed or held to *confer or limit* the rights of the States . . . ." 53 Cong. Rec. 1122 (1916). (Emphasis supplied). During the debate, the italicized language was amended, apparently for grammatical reasons, to read "affect." This change was simply intended to clarify the sponsor's original intention, that is, "to completely hurdle" the question of a state's right to tax output, to leave that question "absolutely alone." *Id.*

Although Congress has been aware that certain states tax the output of mines, it appears that it did not intend to approve such taxes when it amended the 1920 Act some five years ago. As Rep. Mink, the manager of the bill, stated with specific reference to Montana's tax (122 Cong. Rec. 515) (1976):

> "This matter, I believe, will be litigated, but it is certainly not intended to be covered by this legislation."

(*See also* Brief for the United States at 11 n.7).

At the time it enacted the proviso in 1920, Congress was told that the royalty and rental payments provided by the Act were not sufficient to cover legitimate impact costs. (*See* Brief of Appellants at 48-49). This view continued into the 1976 amendment, which increased both the states' share of federal royalties and the minimum acceptable royalties. At that time, Congress was once again solemnly advised that the Western states were suffering large impacts without sufficient revenues to cover legitimate costs. *See* 122 Cong. Rec. 495, 520 (1976) (remarks of Rep. Howe). State taxation was tolerated to meet such costs. Certainly Congress never meant that the states, through excessive taxation, could subvert the Act itself.

CONCLUSION

For each of the reasons set forth above and in the Brief of Appellants, the judgment below dismissing the Complaints should be reversed and the case remanded for trial.

Respectfully submitted,

WILLIAM J. CARL
40 East Broadway
Butte, Montana 59701
(406) 723-5421

Attorney for Appellant Western Energy Company

Of Counsel:

GEORGE J. MILLER
Dechert Price & Rhoads
717 Seventeenth Street
Denver, Colorado 80202
(303) 623-1777

Attorney for Appellant Westmoreland Resources, Inc.

WILLIAM P. ROGERS
Counsel of Record
WILLIAM R. GLENDON
STANLEY GODOFSKY
STEPHEN FROLING
JAMES N. BENEDICT
ANNE E. FONTAINE
Rogers & Wells
200 Park Avenue
New York, New York 10166
(212) 972-7000

PATRICK F. HOOKS
THOMAS A. BUDEWITZ
218 Broadway
Townsend, Montana 59644
(406) 266-3476

Attorneys for Appellants except Western Energy Company

March, 1981

NO. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, *et al.*,
Appellants,

v.

STATE OF MONTANA, *et. al.*,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AS AMICI CURIAE OF THE HONORABLE MAX BAUCUS, THE HONORABLE MARK N. ANDREWS, THE HONORABLE QUENTIN N. BURDICK, THE HONORABLE DENNIS DECONCINI, THE HONORABLE JOHN MELCHER, THE HONORABLE HANK BROWN, THE HONORABLE BYRON L. DORGAN, THE HONORABLE RAY KOGOVSEK, THE HONORABLE MICHAEL E. LOWRY, THE HONORABLE RON MARLENEE, THE HONORABLE JIM SANTINI, THE HONORABLE ALLEN BYRON SWIFT, THE HONORABLE PAT WILLIAMS, THE HONORABLE TIMOTHY E. WIRTH IN SUPPORT OF APPELLEES.

R. Stephen Browning*
1107 Dirksen Senate Office Building
Washington, D.C. 20510
(202) 224-2651

Hamilton P. Fox III

Peter Van N. Lockwood

(* *Counsel of Record*)

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The State Legislature is the Appropriate Governmental Body to Determine Whether a Tax on an Intrastate or Local Activity Should be Imposed, and at What Rate	2
II. Congress Has Recognized the Right of the States to Impose Severance Taxes on Coal and Has Not Preempted Such Taxes	10
III. The Standards Set Forth in *Complete Auto Transit v. Brady* Are Inapposite Here, But Montana's Coal Severance Tax Would Survive Scrutiny Under Those Standards	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)	16
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937)	7, 18
Complete Auto Transit v. Brady, 430 U.S. 274 (1977)	4, 14, 15
De Canas v. Bica, 424 U.S. 351 (1976)	14

TABLE OF AUTHORITIES—CONTINUED

Page

Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978) 4, 14, 17

Exxon Corp v. Department of Revenue of Wisconsin, 446 U.S. ____, 100 S.Ct. 2109 (1980) 7, 18

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 12, 13, 16

Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922) 3

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) 12

Hope Gas Co. v. Hall, 274 U.S. 284 (1927) 3

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 15, 17

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 12, 14

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) .. 4

Mid-Northern Oil Co. v. Walker, 268 U.S. 45 (1925) 11

Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 455 U.S. 425 (1980) 7

TABLE OF AUTHORITIES—CONTINUED

Page

Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978) 7

New York State Department of Social Service v. Dublino, 413 U.S. 405 (1973) 12

Nippert v. City of Richmond, 327 U.S. 416 (1946) 15, 16

Oklahoma v. Kansas Gas Co., 221 U.S. 229 (1911) .. 16

Oliver Iron Mining Co.v. Lord, 262 U.S. 172 (1932) .. 3

Pennsylvania v. Nelson, 350 U.S. 497 (1956) 12

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 (How.) 421 (1856)) 10

Perez v. Campbell, 402 U.S. 637 (1971) 14

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 12

Pike v. Bruce Church, 397 U.S. 137 (1970) 16

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 10

Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947) 12

Schwartz v. Texas, 344 U.S. 199 (1952) 12

Sears, Roebuck & Co. v. San Diego County District Council, 436 U.S. 180 (1978) 12

Page

Statutes:

30 U.S.C. 189 10

42 U.S.C. 8401(a)(2) 11

15-35-101 *et seq.* MCA 10, 18

82-4-201 *et seq. MCA* 10

Miscellaneous:

Testimony of Mr. William Christiansen, Hearings Before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2d Sess., Mar. 21, 1980, Ex. XI, p. 81 8

Testimony of Senator Dave Durenberger, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., Aug. 6, 1980, Table 7, pp. 77-78 ..... 5, 6

Testimony of Senator John Melcher, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., Aug. 6, 1980, Attachment 5, p. 138 9

Testimony of Hon. Ed Herschler, Governor, State of Wyoming, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., Aug. 6, 1980, p. 229 9

H.R. 6625 — To Amend the Powerplant and Industrial Fuel Use Act of 1978 13

H.R. 6654 — Energy Policy and Preservation of Oil and Natural Gases 13

H.R. 7163 — To Amend the Powerplant and Industrial Fuel Use Act of 1978 13

S. 2695 — To Amend the Powerplant and Industrial Fuel Use Act of 1978 13

NO. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, *et al.*,
Appellants,

v.

STATE OF MONTANA, *et. al.*,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AS AMICI CURIAE OF SEVERAL MEMBERS OF CONGRESS IN SUPPORT OF APPELLEES

This brief amici curiae is filed with the written consent of counsel for the parties by several Members of Congress:

INTEREST OF THE AMICI CURIAE

The amici believe that the outcome of this case challenging the power of a State to impose severance taxes on natural resources within its borders could have a substantial impact on the ability of the States to raise taxes to provide for the general welfare of the citizens of those States. Amici are concerned that a decision in favor of

the appellants would set a dangerous precedent for use of the national Commerce Clause power to interfere in the areas of traditional State governmental functions. This brief also serves to inform the Court that Congress is not united in its approach to the issues involved in this case.

SUMMARY OF ARGUMENT

The rate of taxation imposed on an intrastate or local activity, such as the mining of coal, is normally a matter for the State legislature to consider. State sovereignty requires that the states have considerable autonomy in determining which intrastate activities are subject to taxation and at what rates. The factors which go into such a determination are political factors which are appropriately considered by the state legislature, not the federal courts. If the federal courts were to attempt to determine whether the Montana severance tax on strip mined coal is appropriate or fair, not only would they have to make such a determination without any guidelines other than political ones, but also they would be faced with the very real possibility that every state tax would be subject to the same standardless review by the federal courts. Such a result is always to be avoided, and particularly in this case because not only does the Montana tax have a minimal impact on interstate commerce, but also the right to tax has been recognized by Congress.

ARGUMENT

I. The State legislature is the appropriate governmental body to determine whether a tax on an intrastate or local activity should be imposed, and at what rate.

Appellants do not challenge the right of Montana to tax the severance of coal by strip mining; they challenge only the rate of taxation. Appellants ask this Court to make a uniquely political judgment: what is an appropriate

or fair rate of taxation to be imposed on the severance of coal by strip mining. If this Court were to hold that a 30% tax on the severance of coal by means of strip mining is too high, and the Montana legislature were to enact another tax at a rate of 25% or 20% or 15%, this Court would then have to determine the fairness of those rates. These are not judicial issues; they are political questions for the state legislature. If the federal courts usurped this power, the burden on the courts to make such determinations would prove to be extraordinary, for in modern times virtually every state tax "affects" interstate commerce.

A. The decisions of this Court reflect sound policy reasons for upholding the constitutionality of state severance taxes regardless of the rates.

This Court has never held that a state severance tax burdened interstate commerce even when a large percentage of the severed resources subsequently entered interstate commerce. *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1932); and *Hope Gas Co. v. Hall*, 274 U.S. 284 (1927), answer most of the arguments raised by appellants. *Heisler* involved a severance tax on anthracite coal. It was alleged that Pennsylvania had a natural monopoly on anthracite coal in the United States; that coal was a prime necessity for life, especially in the northeastern states; that 80 percent of the coal was shipped outside of Pennsylvania; and that Pennsylvania would be able to force consumers in other states to pay the tax. The Court turned aside the challenge to the tax because the incidence of the tax was prior to the entry of the coal into interstate commerce. A contrary decision would have left the states with nothing to regulate or to tax. *See* 260 U.S. at 259-260.

No subsequent decisions of this Court have imposed limits on the ability of states to tax local activities or articles

merely because the activities "affect" or the articles eventually enter interstate commerce. Indeed, recent Commerce Clause cases have made clear that a state may tax various aspects even of interstate commerce. *See, e.g., Complete Auto Transit v. Brady,* 430 U.S. 274 (1977); *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976); *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

The policy of leaving to the state legislature the decision whether to tax intrastate activities and the rate of such taxation remains a sound one. One of the essential attributes of state sovereignty is the power to raise funds by taxation; this power is essential to the very existence of a state. Almost every local activity has some effect on interstate commerce. If the federal judiciary should bar a tax on a local activity, before it enters the stream of commerce, because it "affects" interstate commerce, then the state's power to tax would be a virtual nullity. Every state tax would be subject to challenge in the federal courts, and the federal courts would become a super-state legislature.

B. The standards for determination of what taxes should be imposed on local activities are political questions for the state legislature and are beyond the institutional competence of the federal judiciary.

When a legislature, whether the Congress of the United States or a state legislature, imposes a tax and determines the rate of that tax, the factors that it considers are political factors. A state legislature decides what tax is fair based on the entire complex of state taxes, upon the ability of the taxpayer to pay, upon a determination as to whether the tax is progressive or regressive, upon how much money the tax will raise, upon constituent interests, upon the impact of the tax on the business community in the state, upon a value judgment as to what activities it wishes to

encourage or discourage by taxation, upon an economic judgment as to whether the effect of the tax will be productive, and upon a host of other political issues.

These determinations are made after informal private consultations and legislative hearings in which witnesses may offer facts, statistics, and opinions as to what the effect of a proposed tax will be. Gradually an imprecise consensus is formed, and a political decision is reached about whether or not the tax should be imposed and the appropriate level of the tax. This is a decision uniquely appropriate to the state legislative process and one for which the federal judiciary is not competent because it is not responsive politically and cannot consider under evidentiary rules all the factors that a state legislature can. Only in the most extraordinary situation, such as a tax imposed on citizens because of their race, in which there is clear Constitutional violation, should the federal judiciary concern itself with a state tax imposed on intrastate activities.

Since almost every type of severance tax which a state can levy can affect some aspect of interstate commerce, every kind of state severance tax could be subjected to a complicated factual analysis as to its impact. Numerous states have severance taxes on a wide variety of resources. Some of those states collect revenues which far exceed the total amount obtained under the Montana coal severance tax. For example, in 1977 the State of Texas collected over $900 million in severance tax revenues—over 20 times the revenues generated by the Montana coal tax that year.[1]

---

[1] See testimony of Senator Dave Durenberger, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., August 6, 1980, Table 7, pp. 77-78.

Beyond that, other states rely far more heavily on royalties and severance taxes than does Montana.

1977

Royalties and Severance Taxes as a Percentage of State Government Revenues

Rank	State	Percent
1.	Louisiana	19.43
2.	New Mexico	15.78
3.	Texas	13.85
4.	Wyoming	11.42
5.	Oklahoma	9.18
6.	Montana	6.82
7.	Alaska	4.46
8.	Kentucky	3.79 [2]

These taxes are on some occasions applied as a percentage of the gross value of the resource, a flat amount per barrel or thousand cubic feet, a percentage of the sales price, and so on. The taxes are, in short, difficult to compare and are the subject of considerable political judgment.

Other types of taxes are equally complicated and could be subject to challenge. States with high levels of tourism and with relatively high hotel, restaurant, entertainment, or gambling taxes arguably force nonresidents to contribute more to state revenues than the benefits which they receive. Examination of inheritance taxes on local real estate or nonresidents might indicate that a state is asking more of these taxpayers than it asks of others. Income, gross receipts, and sales taxes might be subject to challenges based on the Commerce Clause. Who is to say when a tax that goes to support the general revenues of the state is out of all proportion

---

[2] *Id.*, Table 8, p. 79.

to the benefits provided? What standard measures the benefits a taxpayer receives from a state?

Opening state tax rates and benefits received by taxpayers to judicial examination would also open the mix of state taxes to examination. If a state should decide to levy high property taxes and to forego a state income tax or vice versa, one group of taxpayers may be subjected to higher taxes than if both taxes were levied at lower rates. States with high cigarette or alcohol taxes may be imposing heavy taxes on certain consumers who gain no special benefit from the state other than the usual benefits of civilized society and local government.

A challenge to a single tax based on the aggregate revenues resulting from that tax would bring the entire state tax structure before the court. A tax which may seem unreasonable standing alone may be reasonable when the mosaic of all state tax considerations is examined. As this Court stated in *Carmichael v. Southern Coal and Coke Co.*:

> [A]s the state is free to distribute the burden of a tax without regard to the particular purpose for which it is to be used, there is no warrant in the Constitution for setting the tax aside because a court thinks that it could have drawn a better statute or could have distributed the burden more wisely. Those are functions reserved for the legislature. 301 U.S. 495, 525 (1937).

This Court has been a strong defender of the prerogative of a state to determine how to structure its taxes, *e.g., Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), what to include in the tax base, *e.g., Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 455 U.S. 425 (1980), and what accounting method to require, *e.g., Exxon Corp. v. Department of Revenue of Wisconsin*, 466 U.S. ——, 100 S.Ct. 2109 (1980).

Similar deference should be accorded a state's right to

select an appropriate tax rate for a severance tax. Judicial second-guessing of legislative tax decisions would open the courts to every disgruntled taxpayer who feels that a tax imposes an extraordinary burden on himself, and can demonstrate that the tax affects interstate commerce.

C. The effect of the Montana severance tax on coal is not adverse to the national interest and does not warrant the intervention of the federal judiciary.

The factual question which appellants seek to have resolved in the courts—whether the economic impact of the Montana tax is so unfair that it unduly burdens interstate businesses and requires these businesses to pay taxes which are disproportionate to the benefits received—illustrates the complexity of the factual issues which appellants would subject to judicial redetermination. Appellants assert that the 1975 tax is a 30% tax on the value of coal which on a percentage basis, increases by 500% to 1,250% the severance tax today compared to the severance tax that was in effect prior to 1975. (Brief for Appellants at 7-8). This analysis, suggesting astronomical increases in the ultimate price of coal, is faulty for two reasons. First, the tax rate differs depending upon how the coal is mined. The 30% tax is imposed only on strip mined coal, which constitutes the majority but not all of Montana coal. Second, as the following figures demonstrate, the amount of the tax when compared to the ultimate price of coal to the consumer, is far less than appellants imply. The tax is imposed as a percentage of the contract sales price before shipping, and the shipping costs constitute the largest share (typically 60%) of the cost to consumers.[8] Moreover, even with the

---

[8] See testimony of Mr. William Christiansen, Hearings Before the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2d Sess., March 21, 1980, Ex. XI, p. 81.

tax, the price of Montana coal is still considerably lower than the price of coal mined in most other states. Recent estimates show Montana coal selling at $8.50 per ton with Eastern and Midwestern coal selling at over $20 per ton.[4]

Furthermore, a more accurate measure of the impact of an energy resource tax is the tax per BTU of heat produced. Coal, oil, and gas have value by virtue of their heating capability. By this measure, Montana's coal tax produces 9.97 cents revenue per million BTU's. This compares very favorably with other state severance taxes—taxes which appear on their face to be lower than the Montana tax. For example, Louisiana's 12.5% tax on oil is in fact a tax of 16.58 cents per million BTU's—over 60% higher than Montana's coal tax.[5]

We cite these figures not to support an argument on the merits that the Montana tax is reasonable. Rather, we wish to illustrate the complexities of the issue put forth by appellant as to the fairness of the tax and its effect on the ultimate taxpayer and on interstate commerce.

Additionally, there are obvious market restraints which prevent Montana from imposing a tax so high that it would make Montana coal unable to compete with coal mined in other states with alternative sources of energy. Montana has no monopoly on coal, and coal is not the only source of energy. If the tax were so high that it caused the mining of coal in Montana to decline significantly thereby decreasing employment and revenues, there would be sub-

---

[4] See testimony of Hon. Ed Herschler, Governor, State of Wyoming, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., August 6, 1980, p. 229.

[5] See testimony of Senator John Melcher, Hearing Before the Committee on Energy and Natural Resources, United States Senate, 96th Cong., 2d Sess., August 6, 1980, Attachment 5, p. 138.

stantial incentive for the Montana legislature to lower the tax.

Finally, there are legitimate reasons why Montana could choose to impose a heavier tax on strip mined coal than it imposes on other business activities and to set aside part of the proceeds of that tax in a trust fund for future generations. Strip mining may have severe adverse effects on the environment. The Montana State Legislature clearly recognized the severity of these impacts in adopting the coal severance tax (15-35-101 *et seq.*, MCA.) and the Montana Strip and Underground Mine Reclamation Act (82-4-201 *et seq.*, MCA). These environmental costs will be borne not only by the current generation of Montana citizens, who will share in the economic advantages and disadvantages that flow from an active coal industry, but also by future generations long after the economic advantages have diminished or ceased. Coal is a limited resource which, if mined today, will be unavailable to future generations. It is surely within the power of the Montana legislature to tax the depletion of this resource and to set aside a portion of the tax for future generations.

II. Congress has recognized the right of the states to impose severance taxes on coal and has not preempted such taxes.

The Commerce Clause grants the power to regulate interstate commerce to the Congress, not to the courts, and when Congress has acted, the role of the courts should be to enforce Congress' action. *See Pennslyvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 (How.) 421, 430 (1856)); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). Congress expressly recognized the validity of state severance taxes in the Mineral Lands Leasing Act of 1920. 30 U.S.C. § 189 states:

> [N]othing in this Act shall be construed or held to affect the rights of the States or other local authority to

> exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mine, or other rights, property, or assets of any lessee of the United States.

This Court interpreted this language to mean that Congress authorized the states to impose severance taxes upon lessees of Federal lands without regard to the interest of the United States in the lands or leases. *Mid-Northern Oil Co v. Walker,* 268 U.S. 45 (1925). While *Mid-Northern Oil* dealt only with the propriety of state severance taxes on lessees of federal lands, it follows that such taxes on non-federal lands are also proper or else the 1920 Act would authorize a state tax that discriminates against federal lessees.

In enacting the Power Plant and Industrial Fuel Use Act in 1978, three years after the challenged Montana severance tax went into effect, Congress acknowledged that states have severance taxes on coal and other fuels and provided that such severance taxes should be taken into account when determining a state's need for certain impact assistance. *See* 42 U.S.C. § 8401(a)(2). This statute is an express congressional recognition of severance taxes and reflects a congressional determination that these taxes are compatible with the Commerce Clause.

Despite the clear authorization by statute since 1920 for the imposition of severance taxes, appellants urge that the rate of the Montana tax violates the legislative intent of the Mineral Leasing Act, because a broad federal policy in favor of the use of coal underlies other statutes that have no direct relevance to several taxes. In short, appellants urge this Court to ignore the clear language of the statute and interpret the statute by considering the legislative intent of other statutes. This approach turns on their head well-accepted principles of statutory construction. Moreover, even apart from the dispositive effect of the Congressional

authorization to impose severance taxes, the statutes and "policies" cited by appellants offer no basis for concluding that Congress has preempted the Montana severance tax. Indeed, Congressional *amici* supporting appellants make no preemption argument whatsoever in their brief.

Unless there is clear federal preemption—a direct conflict or congressional intent to override contrary state legislation—the judiciary is generally without power to interfere on Commerce Clause grounds with state taxation. In this case, there is no direct conflict between state and federal legislation. The conflict asserted is between federal energy policies promoting the use of coal and the rate of Montana's severance tax on strip mined coal. Without direct conflict, congressional intent to override the state legislation must be found. This intent may be shown in a number of ways, including the pervasiveness of federal regulation, the dominance of the federal interest because of a need for national uniformity, or the danger of conflict between federal and state legislation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231 (1947); *Pennsylvania v. Nelson*, 350 U.S. 497, 502-505 (1956). However, "the exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Service v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952); *see Sears, Roebuck & Co. v. San Diego County District Council*, 436 U.S. 180 (1978); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979). The rule in *Rice v. Santa Fe Elevator Corp.* "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted).

Two factors beyond the express congressional authoriza-

tion of severance taxes make appellants' preemption argument a particularly weak one.

First, although Congress has considered adopting legislation which would limit the rate of state coal severance taxes, *e.g.*, H.R. 6625, H.R. 6654, H.R. 7163, and S. 2695 introduced in the 96th Congress, Congress has been sharply divided over the advisability of such legislation and has not adopted such a limitation. Neither the opponents nor the proponents of these bills argue that existing legislation or policies preempt Montana's severance tax rates. If the advisability of such legislation is hotly contested within the Congress, it cannot be said that there is a clear federal policy in favor of preemption until Congress adopts legislation specifically supporting such limitation.

Second, *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), instructs that a conflict between a general federal policy and a state statute, without a more specific expression of intent to affect a particular type of state statute, is insufficient to preempt the state statute.

> Appellants point out that the Robinson-Patman Act itself may be characterized as an exception to, or a qualification of, the more basic national policy favoring free competition, and argue that the Maryland statute "undermine[s]" the competitive balance that Congress struck between the Robinson-Patman and Sherman Acts. This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute . . . We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to preempt the power of the Maryland Legislature to enact this law. 437 U.S. at 133 (citations and footnotes omitted).

Refusal to find preemption of state legislation on the basis of general federal policies arguably reflected in a few federal statutes is additional insurance that the preemption does not occur "unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co., supra,* 430 U.S. at 525. Because of the lack of congressional agreement on whether state severance tax rates should be limited, and because it cannot be said that the Montana severance tax on coal stands as an obstacle to accomplishment of the objectives of Congress, *De Canas v. Bica,* 424 U.S. 351 (1976), or that it frustrates the full effectiveness of a federal law, *Perez v. Campbell,* 402 U.S. 637, 652 (1971), no federal legislation nor even a "federal policy" preempts the Montana coal severance tax.

III. The Standards Set Forth in Complete Auto Transit v. Brady Are inapposite Here, But Montana's Coal Severance Tax Would Survive Scrutiny Under Those Standards.

This case is unique in that it raises the question not of whether the state may tax a particular activity, but at what rate the state may tax. There is no case law that even suggests standards for the federal courts to use in evaluating the rate of a state tax.

Appellants have urged this Court to apply the fourpart test set out in *Complete Auto Transit v. Brady,* 430 U.S. 274, 278 (1977). Even a cursory glance at the *Complete Auto* test demonstrates that it is a test to measure whether a state may tax an instrumentality of interstate commerce, not a test to measure the rate at which a state may tax a local activity which affects interstate commerce. The cases in which the test has been applied are all cases in which an instrumentality of interstate commerce has been taxed. *See Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978) (tax on unloading of items that have moved in interstate commerce); *Complete Auto Tran-*

sit, Inc. v. Brady, supra (tax on transportation of automobiles in interstate commerce); *cf. Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979) (tax on a shipping container). Indeed the first two parts of the four-part test—substantial nexus to the taxing state and fair apportionment—are obviously irrelevant to a tax on a local activity which occurs entirely within one state and could not be taxed by another state.[6]

Forcing the *Complete Auto Transit* test into a role for which it was not designed, appellants argue that the Montana tax is inconsistent with the final two parts of the test, which prohibit discrimination against interstate commerce and which require that a tax on interstate commerce be fairly related to benefits received by the taxpayer. The argument is not persuasive.

A. The Montana severance tax does not discriminate against interstate commerce because it does not favor local markets over interstate markets.

Appellants argue that the tax discriminates against interstate commerce "because it would shift an extraordinary burden to other states". (Appellants' Brief at 33.) The cases cited do not support such an argument. Appellants concede that the Montana tax does not discriminate on its face, while citing *Nippert v. City of Richmond,* 327 U.S. 416 (1946), for the proposition that a tax which is not discriminatory on its face may discriminate in fact. In order to find discrimination, whether facial or factual, there must be a discrimination against interstate goods or taxpayers in favor of local goods or taxpayers or an attempt

---

[6] It is ironic that appellants rely on these cases which, although largely irrelevant to a tax on a local activity, do generally represent a trend of expanding the power of the states to tax actual interstate commerce, since appellants seek to diminish the power of the states to tax local activities which merely affect interstate commerce.

to benefit local commerce at the expense of interstate commerce. The first type of discrimination occurs in situations such as *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977), where higher tax rates were imposed on out-of-state businesses than on local businesses, or *Nippert v. City of Richmond, supra,* where the facially neutral tax was found to impose a higher tax on out-of-state vendors than on local vendors. The second category of cases is illustrated by *Pike v. Bruce Church,* 397 U.S. 137 (1970), where an Arizona statute prohibited shipment of canteloupes out-of-state unless they had been packed in a state-approved manner, or *Oklahoma v. Kansas Gas Co.,* 221 U.S. 229 (1911), where the state tried to prohibit the exportation of natural gas. In these last two situations the statute was designed to favor local industry at the expense of interstate commerce.

In this case there is no attempt to favor local industry over out-of-state industry nor is there an attempt to prevent local resources from being exported. This case involves a uniform tax on every ton of coal produced in Montana, whether produced by local or out-of-state taxpayers and whether bound for use in or out of Montana. Even if appellants could prove that every ton of coal produced in Montana were eventually exported, that alone would not prove discrimination. Appellants' argument resembles that rejected by the Court in *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978). In that case, *Exxon* challenged a Maryland statute which prohibited producers and refiners of gasoline from operating retail service stations in the state. The effect of the act was to require producers and refiners to divest themselves of any retail outlets which they owned. The divestiture requirements affected only interstate companies, but this Court said that "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level." *Id.* at 125.

The Court listed some of the factors which led to its conclusion that the Maryland statute did not discriminate against interstate commerce:

> In fact, the Act creates no barrier whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce . . . The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. *Id.* at 126. (Citations and footnote omitted.)

Similarly, the Montana statute does not prohibit the flow of interstate goods, does not place added costs on interstate goods as such, and does not distinguish between in-state and out-of-state companies. In short, the tax does not discriminate against interstate commerce.

B. The Montana statute does not burden interstate commerce because Montana has provided services and benefits for which it is entitled to compensation.

Appellants allege that the Montana tax is not fairly related to the services provided by the state and seek an opportunity to prove that the tax bears no relationship to the legitimate needs of Montana. Appellants Brief at 29-30. Although this Court has not decided a case where the "fair relationship" test has been put in issue, more than once this Court has indicated that the fair relationship test would be satisfied by provision of services including "police and fire protection" and "the benefits of a trained workforce and the advantages of a civilized society." *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 445 (1979); *Department of Revenue v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 764 (1978) (concurring

opinion); *Exxon Corp. v. Department of Revenue of Wisconsin*, 446 U.S. ____, 100 S.Ct. 2109, 2122 (1980).

There is no basis for a court to consider other factors. Indeed, appellants have failed completely to suggest how a court could identify, much less quantify, the benefits received by coal companies operating in Montana from the activities of the state's government. Moreover, except in the case of user fees, "a tax is not an assessment of bene fits . . . The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937). In this case there is no allegation that the taxes are not devoted to public purposes. Creation of a trust fund for future generations is a legitimate public purpose. Providing funds to ameliorate the local impact of strip mining, providing funds for education, providing funds for highway improvement, and using taxes for the general support of the government are also legitimate public purposes. *See* 15-35-108 MCA. Federal courts have no basis for substituting their judgments on these matters for those of the Montana legislature.

CONCLUSION

For the foregoing reasons and those set forth by the appellees, the judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

R. Stephen Browning*
1107 Dirksen Senate Office Building
Washington, D.C. 20510
(202) 224-2651

Hamilton P. Fox III

Peter Van N. Lockwood

(* *Counsel of Record*)

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON CO., *et al.*,
Appellants,

v.

STATE OF MONTANA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICUS CURIAE OF THE CROW TRIBE OF INDIANS

RICHARD ANTHONY BAENEN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Attorney for Amicus Curiae
Crow Tribe of Indians

Of Counsel:

WILKINSON, CRAGUN & BARKER
EDWARD M. FOGARTY

LYNAUGH, FITZGERALD & SKAGGS
THOMAS J. LYNAUGH

January 22, 1981

WILSON · EPES PRINTING CO., INC. · 789-0096 · WASHINGTON D C 20001

TABLE OF CONTENTS

	Page
Interest of the Crow Tribe of Indians	1
Summary of Argument	3
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Amoco Production Company v. *Jicarilla Apache Tribe*, No. 80-15 (S. Ct.) ..... *passim*

Crow Tribe of Indians v. *State of Montana*, No. 79-4321 (9th Cir.) ..... *passim*

Crow Tribe of Indians v. *State of Montana*, No. 78-110-BLG (D. Mont.) 2, 7

Merrion v. *Jicarilla Apache Tribe*, No. 80-11 (S. Ct.) ..... *passim*

Statutes:

Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. §§ 398a-398e (1976) 6

Indian Mineral Leasing Act of 1938, *as amended*, 25 U.S.C. §§ 396a-396f (1976) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-581

COMMONWEALTH EDISON CO., *et al.*,
Appellants,

v.

STATE OF MONTANA, *et al.*,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICUS CURIAE OF THE CROW TRIBE OF INDIANS

INTEREST OF THE CROW TRIBE OF INDIANS

Amicus curiae, the Crow Tribe of Indians, is the beneficial owner of more than six billion tons of coal held in trust by the United States.

In an effort to alleviate the extreme poverty long endured by most of its members and to achieve some meaningful degree of economic and political self-sufficiency, the Crow Tribe has undertaken in recent years to develop some of that coal estate—its most valuable tribal resource and its only significant source of tribal income—pursuant to the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1976).

In 1975, the appellee State of Montana enacted a statute pursuant to which it imposed (i) a 30-percent severance tax on the production of and (ii) an additional gross proceeds tax on the sale of all coal produced within the exterior boundaries of the State of Montana—including that coal held in trust by the United States for the benefit of the Crow Tribe.

Because of the severe adverse impact of those Montana state taxes upon the Crow Tribe's attempt to develop its tribal trust property, the Tribe instituted legal action challenging the taxes in the United States District Court for the District of Montana in 1978.[1] Specifically, the Tribe and several of its members sought injunctive and declaratory relief against the imposition, assessment and collection of the Montana severance and gross proceeds taxes upon the development of Crow coal. It was—and is—the Tribe's contention that such enforcement of the challenged tax statute is unconstitutional and unlawful on each of several grounds.

The district court dismissed the Tribe's second amended complaint on April 4, 1979.[2] That dismissal has been appealed to the United States Court of Appeals for the Ninth Circuit; the matter is fully submitted to the court

---

[1] *See* Second Amended Complaint for Injunctive and Declaratory Relief, *Crow Tribe of Indians* v. *State of Montana*, No. 78-110-BLG (D. Mont., filed August 31, 1978).

[2] The Tribe's second amended complaint set forth specific allegations as to the nature, operation and effect of the challenged state taxes. Those allegations, if proven, would entitle the Crow Tribe to the relief sought by its complaint. Without the benefit of any evidence, however, the district court summarily dismissed the Tribe's complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief may be granted.

of appeals, and a decision should be forthcoming at any time.[3]

The Crow Tribe's interest in the instant case arises from this Court's directive—set forth in conjunction with its noting probable jurisdiction herein—that: "The case is set for oral argument in tandem with consolidated cases No. 80-11, *Merrion* v. *Jicarilla Apache Tribe*, and No. 80-15, *Amoco Production Company* v. *Jicarilla Apache Tribe*." [4]

It is the concern of the Crow Tribe that this Court's consideration of the instant case, which involves a challenge to the Montana coal severance tax, "in tandem" with the *Jicarilla Apache* cases, which involve issues of Indian tribal sovereignty, could—unless the Court is made aware of the pendency and nature of the Crow Tribe's challenge to the Montana coal taxes—inadvertently affect the Tribe's own lawsuit.

SUMMARY OF ARGUMENT

The issues presented by the Crow Tribe's challenge to the Montana coal taxes have been carefully articulated and comprehensively treated by the parties before the Court of Appeals for the Ninth Circuit. That controversy is ready for disposition, on its own merits, by the court of appeals.

It is the purpose of this brief amicus curiae, therefore, to alert the Court to the pendency of that action; to

---

[3] Oral argument was heard by a panel of the court of appeals on January 14, 1980. Pursuant to an order of the court of appeals, the parties submitted supplemental briefs, on or about August 1, 1980, addressing the decisions of this Court in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4688 (June 10, 1980); *White Mountain Apache Tribe* v. *Bracker*, 48 U.S.L.W. 4897 (June 27, 1980); and *Central Machinery Co.* v. *Arizona Tax Comm'n*, 48 U.S.L.W. 4904 (June 27, 1980). *See* Order, *Crow Tribe of Indians* v. *State of Montana*, No. 79-4321 (9th Cir., filed July 14, 1980).

[4] 49 U.S.L.W. 3428 (December 9, 1980).

highlight the principal differences between that case, on the one hand, and the *Commonwealth Edison* and *Jicarilla Apache* cases, on the other; and to urge the Court to be sensitive to the importance of the *Crow* case and carefully restrict its "tandem" consideration of *Commonwealth Edison* and *Jicarilla Apache* to the precise facts and issues involved in those cases.

ARGUMENT

The issues presented for review by the Court of Appeals for the Ninth Circuit in the *Crow* case are the following:

> 1. Whether, in the absence of congressional authorization, the State of Montana may impose a 30-percent severance tax and an additional gross proceeds tax upon the production and sale of coal which is held in trust by the United States for the benefit of the Crow Tribe of Indians and which is developed under federal mining leases pursuant to the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1976).
>
> 2. Whether, as a matter of law, there is no set of facts which might be proven, on the basis of which a court could conclude that the imposition, assessment and collection of the Montana severance and gross proceeds taxes upon the development and sale of Crow coal impair the right and ability of the Crow Tribe of Indians to govern itself, its lands and its people.
>
> 3. Whether, as a matter of law, there is no set of facts which might be proven, on the basis of which a court could conclude that the imposition, assessment and collection of the Montana severance and gross proceeds taxes upon the production and sale of Crow coal are pre-empted by (or interfere with) federal law or the Crow Tribe's own coal severance tax.

4. Whether the Enabling Act and Constitution of the State of Montana (which, respectively, contain a prohibition against and a disclaimer of state jurisdiction over any and all lands owned by Indians or Indian tribes) permit the State of Montana to impose a 30-percent severance tax and an additional gross proceeds tax upon the production and sale of coal which is held in trust by the United States for the benefit of the Crow Tribe of Indians and which is developed under federal mining leases pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1976).[5]

Thus, with respect to each claim, the Crow Tribe's challenge to the Montana severance and gross proceeds taxes is based upon (i) the tribal trust nature of the Crow mineral estate, (ii) the Tribe's own status as a sovereign American Indian tribe and (iii) the federal government's control over and treatment of Indians and Indian lands.

The Montana state severance tax has also been challenged in the instant case—by utility company users of Montana coal and by companies which produce coal in Montana—on grounds entirely different from those involved in the *Crow* litigation. No issues of state jurisdiction over Indian tribal trust lands or of Indian tribal sovereignty are involved in this case.[6] However the Court rules in the instant case, therefore, the Crow Tribe urges the Court to restrict its consideration of the Montana state severance tax very carefully to the issues squarely presented herein—issues which do not in any way involve state taxation of *Indian mineral development pursuant to the Indian Mineral Leasing Act of 1938*, 25 U.S.C. §§ 396a-396f (1976).

---

[5] Brief of Appellant at 1-2, *Crow Tribe of Indians* v. *State of Montana*, No. 79-4321 (9th Cir., filed July 23, 1979).

[6] For that reason, the Crow Tribe has not previously involved itself in this litigation. Indeed, even now, it takes no position on the merits of the arguments advanced to date by the parties herein.

The Crow Tribe urges the Court to be similarly cautious in its treatment of the *Jicarilla Apache* cases, which involve two separate challenges to the Jicarilla Tribe's right to impose its own tribal severance tax upon the production of tribal oil and gas held in trust by the United States.[7] Most significantly, the statute involved in the *Jicarilla Apache* cases is the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. §§ 398a-398e (1976). That statute—unlike the Indian Mineral Leasing Act of 1938, pursuant to which Crow coal is produced—expressly authorizes state taxation of oil and gas production. Thus, whatever this Court rules in *Jicarilla Apache*, it should be mindful of this critically important distinction and avoid any unnecessarily sweeping declaratons concerning state taxation of Indian mineral development generally.

The *Crow* litigation, founded in fundamental precepts of American Indian law and federal Indian policy, is of absolutely critical importance to the Crow Tribe and its more than 6,000 members. Since their confinement to a reservation in southern Montana more than a century ago, the Crow people have derived meager economic sustenance by virtue of their ownership and use of farming and grazing lands on the reservation. Historically, and still today, the Crow people have suffered extremely high rates of unemployment and a very poor economic status. Throughout the last century, the Crow Tribe has been severely re-

---

[7] The Crow Tribe's own severance tax was challenged in the district court in a counterclaim asserted by Westmoreland Resources, Inc. (a plaintiff-appellant in the instant case and an intervenor-defendant at the district court level in the *Crow* case). The Crow Tribe moved to dismiss that counterclaim on several grounds, and the district court has ordered proceedings on the Westmoreland counterclaim held in abeyance pending disposition of the principal controversy by the court of appeals.

stricted, by economic limitations, in its efforts to assist its people, provide for their welfare, and raise their standard of living. Because of these severe economic limitations, the Crow Tribe and its people have been highly dependent upon the federal government, both in terms of receiving financial aid and in terms of their own control over the management of their reservation and resources. Only in the last decade has the potential development of the Tribe's vast coal resources made economic and governmental self-sufficiency a realistic prospect rather than a dream for the Crow people.

The State of Montana's imposition of its severance and gross proceeds taxes has severely retarded the Tribe's production of its coal estate, impeded its economic and political development, and impaired its efforts to upgrade the quality of life on the Crow reservation. The Tribe's legal challenge to the continued imposition of those confiscatory taxes [8] deserves the full and careful consideration of any court before which it may come. Such consideration should be permitted to be undertaken unencumbered by any inadvertent precedent or dicta which might emanate from this Court's "tandem" consideration of *Commonwealth Edison* and *Jicarilla Apache* in the absence of full exposition of the issues presented in *Crow*.

---

[8] Between 1975 and June of 1978, for example, the State exacted *more than $19.5 million in tax revenues* from the production of Crow coal—*more than three times* the less than $6 million which was paid in royalties to the Crow Tribe itself in the same period of time. *See* Memorandum Opinion and Order at 3, *Crow Tribe of Indians* v. *State of Montana*, No. 78-110-BLG (D. Mont., filed April 3, 1979). Those figures continue to escalate in the same proportion with the production of each ton of Crow tribal coal.

CONCLUSION

For the foregoing reasons, amicus curiae Crow Tribe of Indians urges the Court to be sensitive to the Tribe's interests as it undertakes to consider and dispose of the *Commonwealth Edison* and *Jicarilla Apache* cases.

Respectfully submitted,

RICHARD ANTHONY BAENEN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4800

Attorney for Amicus Curiae
Crow Tribe of Indians

Of Counsel:

WILKINSON, CRAGUN & BARKER
EDWARD M. FOGARTY

LYNAUGH, FITZGERALD & SKAGGS
THOMAS J. LYNAUGH

January 22, 1981

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

-against-

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees,

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE

LEWIS B. KADEN
Counsel of Record
435 West 116th Street
New York, New York 10027
(212) 280-2743

Attorney for Amici Curiae: Robert W. Edgar, M.C., Silvio O. Conte, M.C., Frank Horton, M.C., James L. Oberstar, M.C., Donald J. Albosta, M.C., Jonathan B. Bingham, M.C., David E. Bonior, M.C., Bill Bradley, Senator, William M. Brodhead, M.C., Lawrence J. DeNardis, M.C., William D. Ford, M.C., Tom Hagedorn, M.C., Tom Harkin, M.C., Carl M. Levin, Senator, Thomas A. Luken, M.C., Stanley N. Lundine, M.C., Nicholas Mavroules, M.C., Stewart B. McKinney, M.C., Henry J. Nowak, M.C., Robert A. Roe, M.C., John F. Seiberling, M.C., F. James Sensenbrenner, M.C., Thomas J. Tauke, M.C., Howard Wolpe, M.C.

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY *et al.*,
Appellants,

-against-

STATE OF MONTANA *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF AMICI CURIAE

This brief, submitted by Amici Curiae in support of appellants, will discuss the following questions:

1. Is a state severance tax on coal which has the practical effect of imposing a burden on interstate commerce subject to commerce clause scrutiny?

2. Does the commerce clause permit a state to tax without limit the severance of coal when substantially all of the burden of that tax is exported to out-of-state purchasers of the coal, and the taxing state realizes the full cost of mining impacts from revenue sources other than the severance tax?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE AND STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. A STATE SEVERANCE TAX ON COAL WHICH AFFECTS AND BURDENS INTERSTATE COMMERCE IS SUBJECT TO COMMERCE CLAUSE SCRUTINY	5
II. THE MONTANA SEVERANCE TAX ON COAL VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS SUBSTANTIALLY PAID BY OUT-OF-STATE PURCHASERS OF COAL AND THE REVENUES BEAR NO RELATION TO THE STATE'S INTEREST	7
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES	
Baldwin v. *G.A.F. Seelig Inc.*, 294 U.S. 511, (1935) ...	13
Boston Stock Exchange v. *State Tax Commission*, 429 U.S. 318 (1977) ...	5,9,10
California v. *Taylor*, 353 U.S. 553 (1957) ...	10
Capital Greyhound Lines v. *Brice*, 339 U.S. 542 (1945) ...	13
Complete Auto Transit, Inc. v. *Brady*, 420 U.S. 274 (1977) ...	7,10
Exxon Corp. v. *Wisc. Dept. of Rev.*, 100 Sup. Ct. 2109 (1980) ...	7
Freeman v. *Hewit*, 329 U.S. 249 (1946) ...	5,14
Fry v. *United States*, 421 U.S. 542 (1975) ...	10
General Motors v. *District of Columbia*, 380 U.S. 553 (1965) ...	11
Gibbons v. *Ogden*, 9 Wheat. 1 (1824) ...	6
Hale v. *Bimco Trading, Inc.*, 306 U.S. 375 (1939) ...	11
Heart of Atlanta Motel v. *United States*, 379 U.S. 241 (1964) ...	7
Heisler v. *Thomas Colliery Co.*, 260 U.S. 245 (1922) ..	4,6
Hood v. *DuMond*, 336 U.S. 525 (1949) ...	9
Hope Gas Co. v. *Hall*, 274 U.S. 284 (1927) ...	6
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) ...	7
Lewis v. *B.T. Investment Managers, Inc.*, 100 Sup.Ct. 2009 (1980) ...	6,7
McGoldrich v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) ...	8
McLeod v. *J.E. Dilworth Co.*, 322 U.S. 327 (1944) ...	9
Michigan-Wisconsin Pipeline Co. v. *Calvert*, 347 U.S. 157 (1954) ...	7,10

	Page
Mobil Oil Corp. v. *Commissioner of Taxes of Vt.*, 100 Sup. Ct. 1223 (1980)	7
Mobil Oil Corp. v. *Dubno et al.*, ____ F. Supp. ____ (D. Conn. 1980)	9
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	10
Nippert v. *City of Richmond*, 327 U.S. 416 (1976)	6,8,11
Norfolk and Western Railway Co. v. *Missouri State Tax Commission*, 390 U.S. 317 (1968)	10
Oliver Iron Co. v. *Lord*, 262 U.S. 172 (1923)	6
Philadelphia v. *New Jersey*, 437 U.S. 617 (1978)	6,7
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)	6
Swift v. *United States*, 169 U.S. 375 (1905)	6,14
United States v. *California*, 297 U.S. 175 (1936)	10
Washington Rev. Dept. v. *Stevedoring Assoc.*, 435 U.S. 734 (1978)	7,10
Western Livestock v. *Bureau of Revenue*, 303 U.S. 250 (1938)	14
Wickard v. *Filburn*, 317 U.S. 111 (1942)	6,7

CONSTITUTIONS & STATUTES

1979 Mont. Laws, Ch. 698	3
Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.*, as amended, 42 U.S.C. § 1857 *et seq*	2
Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627	2
Energy Policy and Conservation Act of 1975 Pub. L. No. 94-163, 89 Stat. 1083	2
Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437	5

Page

Montana Code Annotated:

15-6-132 11

15-6-138(b) 11

15-31-101 *et seq* 11

15-35-101 *et seq* 2

15-38-104 11

Mont. Const. art. IX, § 5 2

Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 2

Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 2

U.S. Const. Art. 1, § 8, cl. 3 5

OTHER AUTHORITIES

Alaska Dept. of Rev., Petroleum Production Reserve Forecast, Quarterly Report, Sept. 1980 3

J. Appleton & J. Kingsley, Western Energy Production, State of New Jersey Office of Policy and Planning (1980) 5

Argonne National Laboratory, A Survey of Electrical Utility Demand for Coal, August, 1979 3

Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219 (1957) 7

Congressional Budget Office, The Windfall Profit Tax: A Comparative Analysis of Two Bills, Nov. 1979 11

The Federalist, No. 22 9

Gillis & McClure, "The Distributional Implications of the Taxation of Natural Resources," 61 Rice University Study (1975) 8

The Missoulian, January 11, 1975 8

Page

R.A. Musgrave, The Theory of Public Finance (1959) 8

National Economic Research Associates, Hearings on H.R. 6625 and H.R. 6654 before the House Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, 96th Cong., 2d Sess., June 5, 1980 3

Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. 629 (1977) 11

L. Tribe, American Constitutional Law (1978) 4

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY *et al.*,
Appellants,

-against-

STATE OF MONTANA *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF AMICI CURIAE

INTEREST OF THE AMICI CURIAE AND STATEMENT

Amici are members of Congress from the States of Connecticut, Iowa, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin. They represent States and localities that are economically distressed. Without exception, these States confront a cycle of economic decline: high unemployment, budget deficits, lagging economic growth, reduction of local government services, and severely deteriorating public infrastructures. The general economic decline of the industrial regions and urban areas of the United States is in part a result of the high cost and short supply of energy in the States represented by Amici.

As members of Congress, Amici have participated in the development of national energy policy intended to reduce the

country's dependence on imported oil. This policy pursues energy independence by two means: stimulation of domestic production of oil and gas through decontrol of prices;[1] and promotion of greater use of other sources of energy, particularly coal.[2]

As a direct result of these national policies, businesses and individual families in the Northeast-Midwest region of the country have become increasingly dependent on coal mined in the Western States. Federal clean air policies further promote the use of Western coal because of its relatively lower sulfur content.[3]

Sixty-eight percent of this invaluable resource—lower sulfur coal—is mined in the states of Montana and Wyoming. Three-quarters of Montana's coal is actually owned by the United States government, and developed pursuant to leases issued to private producers. In 1975 and 1976, Montana imposed a 30% severance tax on the value of coal. Mont. Code Ann. §§15-35-101 *et seq.* Under the provisions of long-term purchase contracts, the full amount of this tax is passed forward to out-of-state purchasers. Appellants Appendix 53. Thus, more than 90% of the Montana severance tax at issue in this lawsuit is exported. The burden is borne not by Montana taxpayers, but by users and consumers of coal in other parts of the country, including the regions represented by Amici.

Montana now realizes more than $60 million a year from its exported severance tax. By constitutional amendment, half of these vast revenues are placed in permanent trust for future use in Montana. Mont. Const. Art IX, §5. The balance of the funds are used to pay for governmental services within the State. This enormous income has permitted Montana to make

---

[1] Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350, 3358; Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, amended by Energy Policy and Conservation Act of 1975, Pub. L. 94-163 (authorizing exemptions from controls), 15 U.S.C. §760a.

[2] See, e.g., Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289; Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871.

[3] Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et. seq.*,as amended, 42 U.S.A. §1857 *et seq.*

sizeable reductions in the property, income and excise taxes imposed upon local residents. 1979 Montana Laws, Ch. 698, amending §§15-30-112, 15-30-114, 15-300-122, and 15-30-142, M.C.A.

If the current tax rates do not change, the States of Minnesota, Iowa, Illinois, Indiana, Wisconsin, Michigan, Ohio and New York alone will pay an estimated $240.4 million in coal severance taxes each year to Montana and Wyoming by 1987.[4] And if the decision of the Montana Supreme Court in this case stands, these coal-rich states will be free to increase the tax by 100%, or 1000%, or any amount they please, exacting billions of dollars annually from out-of-state interests dependent upon Western coal. The prospect is not a fantasy. The state of Alaska, for example, with only 400,000 residents, anticipates oil severance and royalty tax revenues alone of $128 *billion* between 1980 and 1996.[5]

This circumstance imperils the federal system. Unless this Court acts to safeguard the national economy against the individual States' exploitation of a fortuity—the location of natural resources—the prospect looms of a energy wealth gap dividing the nation into warring camps. A few States rich in mineral deposits foresee overflowing coffers, vast improvements in public services, substantial elimination of local and state tax burdens, and the benefits of widespread economic prosperity, all by reason of State exploitation of energy resources through the device of exported taxes. The rest of the nation, dependent for its survival on these costly sources of energy, faces deficits, deterioration and decline.

---

[4] Estimate based on demand projections in Argonne National Laboratory, A Survey of Electrical Utility Demand for Coal, August, 1979. The projected payments were calculated by Irwin M. Stelzer, President, National Economic Research Associates, Hearings on H.R. 6625 and H.R. 6654 before the House Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, 96th Cong., 2d Sess., June 5, 1980.

[5] Alaska Dept. of Rev., Petroleum Production Revenue Forecast, Quarterly Report, September, 1980. (The state also contains massive gas reserves and anticipates producing substantial quantities of gas from these reserves before the end of the decade. More severance tax and royalty revenues derived from this gas production will also accrue to the Alaska state government by the year 2000.)

Obviously the Congress has some responsibility to deal with this national wealth gap. In the 96th Congress, bills were introduced and hearings held on proposals to limit state severance taxes and adjust the federal aid formulae which now perversely enhance the benefits to energy-rich states. Since the beginnings of the republic, however, the judiciary has acknowledged its obligation to protect both the national economy and the federal system against State actions which jeopardize them—particularly when the State taxes or regulations in question divide the nation and threaten to stalemate the national legislature.[6] In the 1980's, an exported State tax which compels families and businesses in Michigan or New York to pay the cost of Montana's schools, roads and health facilities is simply the tariff on interstate trade in contemporary form. If unchecked by this Court, the exorbitant severance tax on essential energy resources may become the latest variant of the kind of divisive and recriminatory State action which made the Constitutional Convention essential.

The Commerce Clause represents the framers' response to the threat of balkanizing local measures that imperilled the economic future of a fledging nation. It rests with this Court today, as it has from the beginning of the republic, to assert the importance of the Union against the contemporary version of the tollgate on the channels of trade.

Summary of Argument

State severance taxes which affect interstate commerce are subject to judicial scrutiny under the Commerce Clause. The Montana courts erred in relying on *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) and similar cases to conclude that the State was immune from Commerce Clause constraints regardless of the effects or burdens its tax imposes on the nation's economy. Whatever the Commerce Clause standard for examining State taxes which affect interstate commerce, when virtually all the burden of the State tax is exported, and the taxing revenues bear no relation at all to the State's interest because its

---

[6] See generally L. Tribe, American Constitutional Law 319-374 (1978).

services and impacts are fully covered by other revenues,[7] the tax violates the Commerce Clause. And in scrutinizing State taxes affecting interstate commerce, the Court must examine the practical effects of the tax on the national economy. When no political or economic constraints exist to limit a State's exploitation of its natural resource, the Court must determine whether the tax revenues bear a fair relation to the State's needs. If the revenues derived from an exported tax are clearly disproportionate to the State's benefits, the tax must fall.

ARGUMENT

I. A STATE SEVERANCE TAX ON COAL WHICH AFFECTS AND BURDENS INTERSTATE COMMERCE IS SUBJECT TO COMMERCE CLAUSE SCRUTINY

The practical effects of the Montana severance tax on coal are plainly subject to scrutiny under the Commerce Clause.[8] This Court's decisions have continuously affirmed that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states . . . [Thus] even without implementing legislation by Congress [the Commerce Clause] is a limitation upon the power of the states." *Freeman v. Hewit,* 329 U.S. 249, 252 (1946); see also *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977).

---

[7] Under federal law governing mineral lands leasing, the State received 50% of all federal royalties on leases within the State. Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437 as amended by Pub. L. No. 94-377, 90 Stat. 1083, 30 U.S.C. §191. The federal government must spend an additional 40% on reclamation projects in the State. Id. In 1978, Montana received $7.5 million in federal land mineral leasing royalties, $12.8 million in other federal subsidies related to local production and $12.4 million in state land leasing revenues. (In that year, coal severance taxes yielded $44.7 million.) These figures are projected to increase dramatically through the 1980's. See J. Appleton and J. Kingsley, Western Energy Production, State of New Jersey Office of Policy and Planning (1980).

[8] Article I, Section 8, Clause 3 of the Constitution provides that: "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

And at least since 1942, it has been well settled that the commerce power reaches activities local in nature but having a substantial effect on interstate trade. *Wickard v. Filburn,* 317 U.S. 111, 122 (1942). The decisions of this Court for the past forty years have rejected mechanical tests of immunity for intrastate activities, including the immunity from Commerce Clause scrutiny conferred upon State mining taxes by the decisions upon which the Montana courts relied in this case. *Heisler v. Thomas Colliery Co.,* 260 U.S. 245 (1922); *Oliver Iron Co. v. Lord* 262 U.S. 171 (1923); *Hope Gas Co. v. Hall,* 274 U.S. 284 (1927). In *Wickard,* Justice Jackson returned the Court to the principle set forth earlier by Marshall and Holmes. *Gibbons v. Ogden,* 9 Wheat. 1 (1824); *Swift & Co. v. United States,* 196 U.S. 375 (1905). In sustaining the exercise of national power over intrastate activity, Justice Holmes observed, "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." 196 U.S. at 398 (1905). While *Wickard* and similar cases specifically reject mechanical immunities for intrastate activities in the course of upholding federal legislative regulation of local activities affecting commerce, the Commerce Clause constraint applies as well to state taxes or regulations which apply to local actions but have an effect and impose burdens on interstate trade. *Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Lewis v. B.T. Investment Managers, Inc.,* 100 Sup.Ct. 2009, 2116-17 (1980); *Pike v. Brice Church, Inc.,* 397 U.S. 137, 140 (1970); *Nippert v. City of Richmond,* 327 U.S. 416, 423-24 (1946). If a local farmer growing winter wheat for his own consumption on a few acres of land is subject to scrutiny under the Commerce Clause, *Wickard v. Filburn,* 317 U.S. 111 (1942), surely Montana's tax—with its devastating effect on the nation's economy, the supply of energy resources, and the balances of fiscal federalism—warrants review as well.

In fact, on no fewer than five occasions in the past four years, this Court has declared that a State tax assessed on a local activity will be sustained only if it is applied to functions having a substantial nexus to the State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. See *Washington*

Rev. Dept. v. Stevedoring Association, 435 U.S. 734, 750 (1978); *Complete Auto Transit Inc. v. Brady,* 320 U.S. 274, 279 (1977); *Mobil Oil Corp. v. Commissioner of Taxes of Vt.,* 100 Sup. Ct. 1223, 1234 (1980); *Exxon Corp. v. Wisc. Dept. of Rev.,* 100 Sup. Ct. 2109, 2122 (1980); *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434, 444-45 (1979).

The Montana courts' conclusion that the tax here at issue is absolutely immunized from constitutional constraint thus disregards in letter and spirit two generations of jurisprudence in which the Commerce Clause has been regularly applied both to the exercise of federal power and to state taxes and regulations affecting interstate commerce. *Wickard v. Filburn,* 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1979); *Philadelphia v. New Jersey,* 437 U.S. 617, 622-23 (1978); *Lewis v. BT Investment Managers, Inc.* 100 Sup. Ct. 2009, 2016-17 (1980). Indeed, in the functional terms by which the tax must be evaluated, it is in fact comparable to the tax on gas in transit which the Court found to be flatly prohibited by the Commerce Clause. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954). See Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 232-233 (1957).

II. THE MONTANA SEVERANCE TAX ON COAL VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS SUBSTANTIALLY PAID BY OUT-OF-STATE PURCHASERS OF COAL AND THE REVENUES BEAR NO RELATIONS TO THE STATE'S SERVICES.

When the practical effects of Montana's tax on coal are examined, the Commerce Clause limits on State taxing power must be found to invalidate the levy. In plain terms, neither economic nor political constraints inhibit the State's ability to exact payments from the out-of-state consumers who purchase its coal. On the one hand, the nation's demand for low sulfur coal—stimulated by an international oil crisis and promoted further by federal energy and environmental policies—effectively eliminates market constraints on the level of the State tax. On the other hand, since more than 90 percent of the tax is paid by out-of-state purchasers according to the terms of

their contracts with producers, no political forces restrain the State legislature's decision. With some severance taxes the question of incidence is debatable, turning on a complex analysis of market dominance, industry, structure, the mobility of labor or capital, the availability of substitute products, and the type of tax at issue. See R.A. Musgrave. The Theory of Public Finance, 287-299 (1959); Gillis & McClure, "The Distributional Implications of the Taxation in Natural Resources," 61 Rice University Studies 143 (1975). In the case of Montana's coal severance tax, the export feature of the tax is conceded, and laid bare by the long term purchase contracts. Appellants Appendix 53.

Montana contends that coal producers, the nominal taxpayers, were politically active in the State legislative process which had led to the adoption of the tax. But the legislative reports demonstrate that the dramatic increase in the tax rate to 30% produced none of the controversy characteristic of state taxing decisions. See, e.g., Representative Ora Halvorson of Kalispell, Montana, Vice Chairman of the Montana House Taxation Committee, quoted in the Missoulian, January 11, 1975. The legislature saw, and seized, an opportunity to enrich Montana's treasury without any burden to the state, without any effect on the state's residents, without any pain to the State's own taxpayers.

This Court has long recognized the special dangers from exported tax burdens. "[T]o the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrich v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n. 2 (1940). In invalidating state taxes on local activities involving the solicitation of local sales which are inextricably linked with the interstate commerce of the out-of-state selling, the Court has indicated that "provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the Commerce Clause was put in the fundamental law to guard against." *Nippert v. City of Richmond*, 327 U.S. 416, 434 (1946).

It was just this type of threat from provincial state efforts to exact tribute at the expense of interstate trade that brought the delegates to Philadelphia in 1787. States controlling strategic ports and trade routes exploited their neighbors, who responded with reprisals and recriminations. Trade rivalries jeopardized the Union and destroyed the Confederation. In Hamilton's words, the framers agreed upon the Commerce Clause as a device to suppress "interfering and unneighborly regulations of some states . . . [which might be more] serious sources of animosity and discord . . . if not restrained by a national control." The Federalist No. 22 (A. Hamilton). Madison spoke at the Convention of the "rival, conflicting and angry regulations" which required a general power in Congress to limit the ambitions of parochial states. 3 Farrand, Records of the Federal Convention 547 quote in *Hood v. DuMond*, 336 U.S. 525, 534 (1949). As this Court has observed, "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several states." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

In 1787, the states' favorite strategem was the tariff on trade or the barrier at the state border. In 1981 the technique most often employed is the exported tax burden. Energy-rich states exploit the dependence of others on their resources by increasing severance taxes. As in the 1780's, those less advantaged states retaliate, attempting to tax local activities in ways that put the burden to pay on out-of-state interests. See, e.g., *Boston Tax Exchange v. State Tax Commission*, 429 U.S. 319 (1977), (invalidating New York's differer stock transfer taxes as discriminatory); *Mobil Oil Corp. et al v. Dubno* et al ____F.Supp.____ (D. Conn. 1980) (invalidating a Connecticut statute prohibiting petroleum refiners and distributors from passing the state's gross receipts tax forward to Connecticut purchasers).

In circumstances such as these, where a taxing state's power is untrammeled by any normal economic or political forces, the courts must examine closely the effects of the tax. In operation, the Montana severance tax on coal is a tax on exports as plainly violative of the principle of the open economy expressed in the Commerce Clause as a tariff on trade, a tollgate at the state's border, or a tax on goods in transit. Its

effects or consequences are no different because the tax attaches to the local activity of mining rather than the interstate activity of transportation. That is the plain learning of recent cases departing from a concept of mechanical immunity for state taxes affecting interstate commerce. *Washington Rev. Dept. v. Stevedoring Association,* 435 U.S. 734, 750 (1978). Compare *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 257 (1954). Moreover, as a "tailored tax" burdening out-of-state interests without touching Montana's taxpayers, it "must receive the careful scrutiny of the Courts to determine whether it produces a forbidden effect on interstate commerce." *Complete Auto Transit Inc. v. Brady,* 430 U.S. 274, 288-289, n. 15 (1977).

Examination of the effects of this tax readily discloses the need for its invalidation. When exported to out-of-state purchasers who depend on the natural resources at issue, excessive severance taxes have two detrimental effects. Plainly, interstate trade in coal—a goal of national policy adopted in the 1970's—is burdened by an unlimited state power to exact severance levies. Of equal importance to the national economy, however, is the distorting effect on the fiscal balance of the federal system. Decisions of this Court establish that the activities of state and local governments affecting commerce are subject to the commerce power just as much as the activities of private economic interests. See, e.g. *Fry v. United States,* 421 U.S. 542, (1975); *California v. Taylor,* 353 U.S. 553 (1957); *United States v. California,* 297 U.S. 175, (1936).[9] When excessive, exported severance taxes of a few states have the effect of distorting the federal system, the national economy is threatened no less than it is when state taxes or regulations discriminate against private interstate trading activity or impose multiple burdens on private commercial transactions. See, e.g., *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977); *Norfolk and Western Railway Co. v. Missouri State Tax Commission,* 390 U.S. 317 (1968); *Hale v. Bimco Trading Inc.,*

[9] At least since 1976, of course, the exercise of the commerce power is subject to a special immunity from federal regulations intruding unduly into state sovereignty interests. *National League of Cities v. Usery,* 426 U.S. 833 (1976).

306 U.S. 375 (1939); *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (1965).

The effect of Montana's unlimited taxing power over the severance of coal, if confirmed by this Court and combined with the equivalent power of other energy-rich states, will be to transfer billions of dollars annually from consuming states in the nation to these few energy rich states.[10] The resulting wealth gap can only exacerbate other social and economic conditions afflicting the older industrialized states and urban areas of the Northeast-Midwest region. The inevitable consequence is precisely the kind of divisive rivalries and recriminating actions which the Commerce Clause was adopted to prevent.

The State of Montana and the lower courts contend that even if the Court's "practical effect" standard of review applies to severance taxes, the relevant part of that test—the requirements that the tax bear a fair relation to state services— is satisfied without any factual inquiry, simply on the ground that Montana exists as a government and provides the benefits of a civilized society. This is so, the State maintains, even though the Governor of Montana concedes in Congressional testimony that the State's needs are more than satisfied by its share of federal royalty payments, and even though the State also realizes other tax revenues from coal mining. See Testimony of Governor Thomas Judge, Surface Mining Control and Reclamation Act of 1977: Hearings on S7 before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. 629 (1977); Montana Code Ann. 15-38-104 (Resource Indemnity Trust Tax); 15-6-132 (Gross Proceeds Tax); 15-6-138(B) (Property Tax on Mining Equipment); 15-31-101 *et seq.* (Corporate License Tax).

---

[10] Recent studies estimated increased state revenues resulting solely from oil price decontrol at approximately $112 billion during the next decade. Congressional Budget Office, The Windfall Profits Tax: A Comparative Analysis of Two Bills, November, 1979, p. 22.

To interpret the "fair relation" requirement in this fashion is to reduce it to a nullity. Each state government provides public services and affords the benefits of a civilized society. This status affords it a wide latitude in taxing local activities, including mining. But it cannot free the State's actions entirely from any judicial examination. When the state tax is substantially paid by out-of-state consumers; the state's service needs are fully covered by other state and federal revenues; and market and political constraints on the state's taxing decisions are wholly absent, then the Commerce Clause must limit the state's power adversely to affect the national economy.

Both Appellants and Amici concede that Montana has the power to tax mining activity, including the power to exact some severance tax. But there exists a point when that severance levy amounts to a tax on exports. As such, it burdens the open economy of the nation, distorts the federal system and must be invalidated. In some future cases that line may be difficult to detect. It will require the lower courts to examine through factual testimony and evidence the incidence of the tax, the existence of political and market constraints, the relation of taxing revenue to the state's needs. This is, of course, a traditional function of the judiciary in our system of government. But this tax fails by any standard involving examination of its practical effect and consequences. It is straightforwardly a tax on exports. It gives Montana vast wealth without any local burden and it involved not the slightest economic or political constraints on state legislative decisions. Its effects on other states and on the national economy, as measured by fiscal distortions in the federal system, are enormous.

It is no answer to insist that judicial examination of state energy taxes may founder on the difficult cases ahead. There are always difficult cases confronting this Court. More important, this is not that difficult case. The extremity of the factual situation presented here is best appreciated by attempting to envision a precise analogue involving another state resource. Imagine a circumstance in which Maryland and Louisiana fishermen accounted for 70% of the nation's crabs; 90% of these crabs were consumed in other states. A severe national drought

substantially eliminated beef, poultry and other domestic protein sources. International political developments made it essential that the United States reduce, not expand, its beef and poultry imports. The Congress adopted numerous statutes to promote crab consumption. In most of the country, there existed no substitute for Maryland and Louisiana crabs. The Maryland legislature imposed a 100% tax on the value of crabs produced in the state. The tax yielded revenues, paid by out-of-state purchasers pursuant to their contracts with Maryland producers, which permitted Maryland to reduce all other state and local taxes, to add new and improved public services, and to create a permanent trust fund with annual per capita contributions equal to the remaining per capita tax burden on Maryland residents—all without any political opposition within Maryland, and without any effect on the volume of crab production, which continued to increase dramatically each year. Congress debated the problem of national dependence on Maryland crabs and the Maryland tax on exports, but did not act.

In another comparable case the Court would exercise its historic role and subject the tax, as Justice Frankfurter put it, "to the scrutiny which the Commerce Clause requires so that interstate commerce may enjoy freedom from State taxation outside of those narrow limits within which states are free to burden such commerce." *Capital Greyhound Lines v. Brice,* 339 U.S. 542, 548 (1945). In protecting the national interest in this hypothetical example against one state's aggrandisement of its monopoly over an essential food supply, the Court might well recall Justice Cardozo's statement: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). But, the length to which one must go in devising a case analogous to this one underscores its extremity, and makes plain that in enforcing the Constitution here, the Court would neither cabin state discretion in taxing decisions nor render susceptible to judicial revision the overwhelming proportion of state levies.

Appellees further contend that the "practical effects" analysis which the Court has now substituted for mechanical and formalistic immunities is a "one-way ratchet," available only to allow state taxes on interstate activities so that "interstate commerce pays its way." *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 254 (1938). See also *Freeman v. Hewit,* 329 U.S. 249, 253 (1946). Nothing in the Court's recent decisions supports this view. Indeed, the import of the recent cases is that the Court has adopted for *all* purposes a standard recognizing that the commerce among the states which the Constitution safeguards is "not a technical conception, but a practical one." *Swift v. United States,* 196 U.S. 375, 398 (1905).

The several states cannot be expected always to be sensitive to the values to the nation of political and economic interdependence. In this case, the Court has the opportunity to affirm for the future an enduring principle of economic interdependence; to put content into its evolving "practical effects" standard for review of state taxes which burden interstate commerce, and to check this contemporary pattern of interstate rivalries and state efforts to export the burdens of government. At root, what is at issue here is whether taxpayers in Minnesota or Ohio, already subject to high taxes, high energy costs, high inflation and all that follows, may be obligated to pay as well for Montana's governmental services. If the lower court decision stands without modification, Montana and other energy-rich states will be as free as the appellees maintain to increase their severance taxes without limit. Without any of the usual constraints from either the market or the political arena, the tax may be set not at 30%, but 100% or 1000% of the value of coal taken from the ground. If New York attempted to exact vast revenues from other states whose residents depended upon its financial and cultural facilities, or if Florida disproportionately increased its taxes on tourism, the market would provide alternatives to New York's facilities or Florida's sunshine. But as a result of world-wide economic events, energy-rich states like Montana have come to hold the country hostage. Montana's coal is vital to energy needs in other

regions. There are no available substitutes. To permit unlimited taxation of exported natural resources simply because the state attaches the tax to local mining is to divide the nation and imperil its economic integrity.

CONCLUSION

For the reasons set forth above, the judgement below dismissing the complaint should be reversed.

Respectfully submitted.

LEWIS B. KADEN
Attorney for Amici Curiae

January 22, 1981

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

AMICUS CURIAE BRIEF OF ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN SUPPORT OF APPELLEES

DAVID B. ROE
Counsel of Record

PATRICIA L. WELLS
2606 Dwight Way
Berkeley, California 94704
(415) 548-8906

JONATHAN LASH
1725 I Street, N.W.
Washington, D.C. 20006
(202) 223-8210

Attorneys for Amici Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, et al.,
Appellants,

—against—

STATE OF MONTANA, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

AMICUS CURIAE BRIEF OF ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN SUPPORT OF APPELLEES

This brief addresses two questions:

1. Whether trial is necessary to apply the test of *Complete Auto Transit* v. *Brady*, 430 U. S. 274 (1977), and

2. Whether trial is necessary to evaluate the putative conflict between state and federal policy that appellants pose.

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE "FAIRLY RELATED" ISSUE CAN AND SHOULD BE DETERMINED WITHOUT TRIAL IN THIS CASE.	4
A. Montana's severance tax is well within constitutional bounds since it is nondiscriminatory and it imposes no practical burden on interstate commerce.	4
B. States are entitled to wide latitude in gauging the present and future impact costs of developing non-renewable resources.	7
C. How large the burdens of present and future coal development will be on Montana's environment and economy is a question particularly suitable for legislative judgment, since the costs cannot be sharply quantified...	8
II. NO NATIONAL ENERGY POLICY CONFLICTS WITH MONTANA'S IMPOSITION OF A SEVERANCE TAX ON COAL DESIGNED TO COMPENSATE THE STATE FOR THE EFFECTS OF COAL MINING. FEDERAL POLICIES TOWARD ENERGY ARE EXPRESSED IN STATUTES WHICH SHOULD BE INTERPRETED BY THIS COURT.	10
A. Federal policies toward energy are stated in many statutes designed to achieve diverse objectives. No uniform policy exists.	10
B. Federal statutes relating to energy generally, and coal in particular, firmly link development with environmental considerations, and with prices high enough to meet multiple goals.	15
C. The statutes relied upon by appellants do not manifest a Congressional policy favoring low sulfur western coal at the lowest possible price.	16
D. Even assuming arguendo that there is a discernible policy to favor coal development over other values and alternatives, Montana's tax should be upheld without trial.	17
CONCLUSION	19
APPENDIX	

* We gratefully acknowledge the excellent assistance of Steven R. Weiss in preparing this brief.

TABLE OF AUTHORITIES.

	PAGE
Cases.	
Capitol Greyhound Lines v. *Brice*, 339 U. S. 542 (1950)	7
Complete Auto Transit v. *Brady*, 430 U. S. 274 (1977)	4,6n.5,7
Commonwealth Edison v. *Montana*, 615 P. 2d 847 (1980)	6n.6,9n.9
Evansville-Vanderburgh Airport Authority District v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972)	7
Exxon v. *Hughes*, 437 U. S. 117 (1978)	6n.8
Geer v. *Connecticut*, 161 U. S. 519 (1896)	4n.1
General Telephone Co. v. *Michigan Public Service Commission*, 78 Mich. App. 528, 260 N. W. 2d 874 (1977)	6n.7
Heisler v. *Thomas Colliery Co.*, 260 U. S. 245 (1922)	4n.1
Hines v. *Davidowitz*, 312 U. S. 52 (1941)	18
Hughes v. *Oklahoma*, 441 U.S. 322 (1979)	4n.1
Lewis v. *BT Investment Managers, Inc.*, ____ U. S. ____, 64 L. Ed 2d 702, 712 (1980)	7
Minnesota v. *Clover Leaf Creamery Co.*, ____ U. S. ____, 49 U. S. L. W. 4111 (1981)	5,8
Mobil Oil. Corp. v. *Commissioner of Taxes of Vermont*, ____ U. S. ____, 100 S. Ct. 1223 (1980)	4n.1,7
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 (1938)	6n.8
Statutes.	
U. S. CONSTITUTION, Art. I, § 8, cl. 3 (Commerce Clause)	*passim*
Crude Oil Windfall Profits Tax Act of 1980, Pub. L. 96-223, 94 Stat. 229 (1980)	11n.14, 12n.16, 13n.18, 19
Department of Energy Organization Act, 42 U. S. C. §§ 7101-7352	12n.16, 13n.18, 19, 14n.20

	PAGE
Emergency Energy Conservation Act of 1979, 42 U. S. C. §§ 8501-8541	12n.16, 13n.19
Emergency Petroleum Allocation Act, 15 U. S. C. §§ 751-760h	12n.16, 13n.19
Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 (1976)	11n.14, 13n.18, 19, 14n.20
Energy Reorganization Act of 1974, 42 U. S. C. §§ 5801-5891	12n.16, 13n.18, 19, 14n.20
Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871 (1975)	11n.14, 12n.16, 13n.18, 19, 17n.28
Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (1980)	11n.14, 12n.16, 13n.18, 19,14
Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 (1974)	12n.16, 13n.18, 17n.28
Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174 (1978)	11n.14, 12n.16, 13n.18, 19
Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (1976)	12n.16, 13n.18, 14n.20, 16n.26

	PAGE
Federal Nonnuclear Energy Research and Development Act of 1974, 42 U. S. C. §§ 5901-5917	11n.14, 12n.16, 13n.18, 19, 14n.20
Geothermal Energy Research, Development, and Demonstration Act of 1974, 30 U. S. C. §§ 1101-1164	11n.14, 12n.16, 13n.18, 14n.20
Magnetic Fusion Energy Engineering Act of 1980, 42 U. S. C. §§ 9301-9312 (1980)	11n.14, 12n.16, 13n.18
National Energy Conservation Policy Act, 42 U. S. C. §§ 8211-8278	11n.14, 12n.16, 13n.18, 19
National Energy Extension Service Act, 42 U. S. C. §§ 7001-7011	11n.14, 12n.16, 13n.18, 19
Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3301-3342	12n.16, 13n.18, 19
Ocean Thermal Energy Conversion Act, Pub. L. 96-310, 94 Stat. 941 (1980)	11n.14, 12n.16, 13n.18, 19
Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, 94 Stat. 2697 (1980)	11n.15, 12n.16, 13n.18, 19, 14n.20

	PAGE
Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (1978)	12n.16, 13n.18, 19, 14n.20, 17n.28
Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (1978)	11n.15, 12n.16, 13n.18
Solar Energy Research, Development, and Demonstration Act of 1974, 42 U. S. C. §§ 5551-5566	11n.14, 12n.16
Solar Heating and Cooling Demonstration Act of 1974, 42 U. S. C. §§ 5501-5517	11n.14, 12n.16, 14n.20
Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U. S. C. §§ 5581-5594	11n.14, 12n.16, 13n.18
Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1201	12n.16, 13n.18, 14n.20, 16
Wind Energy Systems Act of 1980, Pub. L. 96-345, 94 Stat. 1139 (1980)	11n.14, 12n.16, 14n.20
Clean Air Act, as amended, 42 U. S. C. §§ 7401-7642	14n.20, 16n.25, 17
Clean Water Act Amendments to the Federal Water Pollution Control Act, 33 U. S. C. §§ 1251-1376	14n.20
National Environmental Policy Act of 1969, as amended, 42 U. S. C. §§ 4321-4361	14n.20
Resource Conservation and Recovery Act of 1976, 42 U. S. C. §§ 6901-6987	14n.20
Uranium Mill Tailings Radiation Control Act of 1978, 42 U. S. C. §§ 7901-7942	14n.20

PAGE

Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et seq.* 16n.20
Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 1801 *et seq.* 16n.20

State Laws.

Illinois Ann. Stat. Ch. 111⅔, § 32 6
Michigan Comp. Laws Ann. § 460.6 6
Minnesota Stat. Ann. § 216B.01, § 216B.03 6
Wisconsin Stat. Ann. § 196.03(1) 6

Legislation.

H.R. 6625, 96th Cong., 2d Sess. (1980) 18
H.R. 6654, 96th Cong., 2d Sess. (1980) 18
H.R. 7163, 96th Cong., 2d Sess. (1980) 18
S. 178, 97th Cong., 1st Sess. (1981) 18

Legislative History.

H.Rep.No. 95-218, 95th Cong., 1st Sess. (1977) 14n.21
H.Rep.No. 95-294, 95th Cong., 1st Sess. (1977) 14n.21
H.Rep.No. 94-681, 94th Cong., 1st Sess. (1975) 16n.26
S.Rep.No. 95-141, 95th Cong., 2d Sess. (1978) 14n.21
H.Rep.No. 95-294, 95th Cong., 1st Sess. (1977) 17

Miscellaneous.

Allen Kneese and Charles Schultze, POLLUTION PRICES AND PUBLIC POLICY (1975) 15n.23
Executive Branch Review of Environmental Regulations; Hearing before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works of the United States Senate, 96th Cong., 1st Sess. 406 (Statement of Alfred Kahn) 15n.23
Ayres and Doniger, *New Source Standard for Power Plants: Consider the Law*, 3 HARV. ENV. L. REV. 63 (1979) 17n.27

PAGE

Arthur Sampson, THE SEVEN SISTERS (1975)..... 11n.12

ENERGY FUTURE (R. Stobaugh and D. Yergin, eds. 1979) 11n.12

ENERGY POLICY IN PERSPECTIVE (D. Goodman, ed. 1980)..... 11n.14,15

AN ANALYSIS OF FEDERAL INCENTIVES USED TO STIMULATE ENERGY PRODUCTION, Battelle Laboratories (1980) 11n.13

HISTORICAL ENERGY SALES (October 1980)..... 5n.1

Annual Report of Montana Power Company (1979) ... 5n.3

Executive Order 12287, 46 Federal Register 9909 (1981)..... 11n.15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, et al.,
Appellants,

—against—

STATE OF MONTANA, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

AMICUS CURIAE BRIEF OF ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN SUPPORT OF APPELLEES

INTEREST OF AMICI

Amici are three national organizations dedicated to protection of the environment and to the responsible use and preservation of natural resources. The combined membership of amici in the United States exceeds 275,000. All amici have a strong interest in evaluating the environmental consequences of energy development, in minimizing undesirable consequences, and in assuring that unavoidable damage to the environment be repaired insofar as possible. A more detailed description of each amicus appears in the Appendix to this brief.

In this case, appellants seek to constrict the ability of a state to impose a non-discriminatory tax, and to set aside tax revenues in a trust fund, in order to defray the costs of present and future environmental damage from coal extraction. Amici support the state's efforts to mitigate the uncertain and partially unpredictable harm to its environment.

Counsel for the parties have consented to the filing of this brief in support of appellees, and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

At stake in this case is a state's power to levy a non-discriminatory tax on the extraction of coal, in order to defray the present and future costs of that extraction as they fall on the state's environment, economy, and society. Appellants do not contend that such taxes are invalid altogether, but they argue that in this case the Constitution requires Montana's tax to be lowered; and they insist that trial is necessary in order to quantify the short- and long-term burdens that coal extraction will impose on Montana. They also seek trial, in state court, to delineate "national energy policy," and then to set a dollar ceiling on the amount of tax Montana can levy on coal producers without "substantially frustrating" the policy thus delineated.

The constitutionality of Montana's tax can readily be determined without trial in this case, because the case in its present posture demonstrates that the tax is non-discriminatory and that it has not operated to hinder commerce in Montana coal.

The challenged tax falls with equal weight on Montana consumers and consumers out of state; its practical effect is neither discriminatory nor tailored. Manifestly, the tax is not preventing very large amounts of Montana coal from being mined and sold in interstate commerce, at prices which appellant utilities seem to find competitive with other energy sources.

Whether Montana's tax fairly relates to the burdens of coal extraction is an issue particularly unsuitable for trial. As a matter of constitutional law, the state is entitled to wide latitude in deciding what level of taxes is fairly related to the present and future impacts of extracting its non-renewable resources. In addition, the full cost of many important impacts is not quantifiable with objective precision. The degree of impacts in the future is necessarily speculative in part. Some impacts are highly subjective, such as the value of clean air and unscarred land. Other impacts may not be discovered for several years. Appellants have not suggested any judicial standards that could govern a fact-finding process, either at trial or on review.

The challenged tax does not conflict with federal statutes, as the Court can determine for itself without trial. Even assuming a partial federal policy in favor of coal development, balanced against environmental concerns and other energy sources exists, there is no discernible policy in favor of coal production in disregard of those balancing factors, or at the cheapest possible prices—the policy appellants require to support their argument. As a whole, "national energy policy" as expressed in federal statutes is a far more elusive concept than appellants contend.

ARGUMENT

I. THE "FAIRLY RELATED" ISSUE CAN AND SHOULD BE DETERMINED WITHOUT TRIAL IN THIS CASE.

Appellants concede that a coal severance tax imposed by a state is constitutional in principle. However, they argue that the Commerce Clause entitles them to have their taxes lowered in this case, to a level to be set at trial. They insist that trial is necessary to apply the test of *Complete Auto Transit* v. *Brady*, 430 U. S. 274 (1977), which requires in part that a tax be "fairly related to the services provided by the State." 430 U. S. at 279. At trial, appellants would attempt to quantify the total impacts of coal extraction on the state of Montana and to fix a dollar value on the costs of avoiding or repairing them. Appellants' brief at 12. Appellants recognize that those total impact costs are what define the permissible scope of the tax.

Amici agree that the "fairly related" test of *Complete Auto Transit* is applicable,[1] and that the total impact costs of coal extraction activity are the proper constitutional boundary for Montana's severance tax. But from those premises, the necessity for trial does not follow. Nothing in the *Complete Auto Transit* test, either as formulated or as subsequently applied by this Court, indicates that a quantification of impacts at trial is required in every case, or even that it is desirable to subject the legislative judgment of a state in this context to a detailed second-guessing.

A. Montana's severance tax is well within constitutional bounds, since it is non-discriminatory and it imposes no practical burden on interstate commerce.

In support of their argument for trial, appellants rely heavily on the claim that the challenged tax is discriminatory, and tailored to fall disproportionately on out-of-state taxpayers

---

[1] Applying the practical rule of *Complete Auto Transit*, rather than the convenient but formalist rule of *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245 (1922) is consistent with recent cases. *See, e.g., Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, ____ U. S. ____, 100 S. Ct. 1223, 1234 (1980). In *Hughes* v. *Oklahoma*, 441 U. S. 322, 325 (1979), the Court discarded the similarly formalist rule of *Geer* v. *Connecticut*, 161 U. S. 519 (1896).

and consumers. But it is not. Over sixty percent of Montana's electricity customers are served by the Montana Power Co.[2] Appellants cannot be unaware that Montana Power buys coal and burns it at three large, coal-fired electric generating plants located within the state, since appellant Western Energy Co. is the sole supplier of coal for all three plants (Western Energy is a wholly owned subsidiary of Montana Power Co.).[3] Nor can they be unaware that the coal sold to Montana Power for in-state consumption is taxed at the same rate as coal sold out of state, since appellant Western Energy is the taxpayer of record for that coal.[4] In-state coal purchasers receive no tax advantage under Montana's tax. Nor is there any advantage to ultimate electricity customers located in Montana, whose electricity is made from taxed coal and who are therefore affected by the tax in exactly the same way as customers of any of the utilities seeking relief here.

In the absence of discrimination, the principal factor to be assessed is the degree of burden on interstate commerce. *Minnesota* v. *Clover Leaf Creamery Co.*, ____, U. S. ____, 49 USLW 4111, 4115 (1981):

> Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate com-

---

[2] In calendar year 1979, Montana Power Co. sold 7,026,040,015 kilowatt-hours of electricity in Montana. *See* Montana Power Co., *Rate Increase Application,* Montana Public Service Commission Docket #80.4.2. Overall sales within the state for the same period were 11,066,000,000 Kilowatt-hours. *See* Montana Department of Natural Resources and Conservation, *Historical Energy Sales* (October 1980), at 21.

[3] *See* Securities and Exchange Commission Form 10-k, *Annual Report of Montana Power Company* dated 12-31-79, SEC file #1-4566, at 17, 25. The three plants are Colstrip Units 1 and 2, located at Colstrip, Montana (50% ownership by Montana Power Co.), and the Corette plant, located at Billings, Montana (100% ownership). *Id.*

[4] *See Statement of Coal Produced and Severance Tax for Quarter* ____, submitted quarterly by Western Energy Company to the State of Montana Department of Revenue. Together, the three in-state plants burn in excess of three million tons of coal per year. *Id.*, statements for 3-31-80, 6-30-80, 9-30-80, and 12-31-80.

merce by the Minnesota Act is 'clearly excessive in relation to the putative local benefits.' [citation omitted][5]

In this case, interstate commerce in Montana coal has flourished in the presence of the challenged tax. The tax has not prevented Montana coal production from quadrupling in the last decade,[6] nor has the tax prevented appellant utilities from buying Montana coal at what they must have considered fair and reasonable prices, in comparison to other energy sources.[7] The utility appellants here do not contend that their coal purchases would substantially increase if the challenged tax were reduced, nor that the proportion of coal they intend to rely on, as compared to other energy sources, would substantially change. Thus, even as a matter of pleading, no practical interference with interstate commerce appears in this case.[8]

---

[5] The fair relation of burdens and benefits, so discussed in the quoted passage, is the non-tax equivalent of the "fairly related" test as set out in *Complete Auto Transit*. The challenged state law in *Minnesota* v. *Clover Leaf Creamery* was a ban on one type of milk container, and the Court looked to the relationship between the disadvantage to commerce on the one hand, and the advantage to the state on the other. Where the challenge is to a non-discriminatory state tax, as in *Complete Auto Transit* and this case, the disadvantage to commerce is simply the amount of the tax, and the advantage to the state is the legitimate end to which the tax revenues are put. The constitutional requirement, that there be a fair relationship between them, is the same.

[6] See the decision by the Montana Supreme Court below, 615 P. 2d 847, 849-850 (1980).

[7] Regulated public utilities are under a duty to provide service, including the generation of electricity, at reasonable cost. See, e. g., Illinois Ann. Stat. ch. 111⅔, § 32; Michigan Comp. Laws Ann. § 460.6, *General Telephone Co.* v. *Michigan Public Service Comm'n*, 78 Mich. App. 528, 260 N. W. 2d 874, 877 (1977); Minnesota Stat. Ann. § 216B.01, § 216B.03; Wisconsin Stat. Ann. § 196.03(1). It would therefore be illegal for appellant utilities to pay unreasonably high rates for their coal.

[8] For Commerce Clause purposes, burdens on taxpayers must be distinguished from burdens on interstate commerce. *Exxon* v. *Hughes*, 437 U. S. 117, 126 (1978). Montana's tax obviously raises the price of coal, and thus the cost of doing business for coal sellers; but by itself, an increased cost of doing business is unobjectionable. *See Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938). The same is true of a regulation that raises costs to ultimate consumers. *Exxon* v. *Hughes*, *supra*, 437 U. S. at 127-128.

The teaching of *Complete Auto Transit* and succeeding cases has been to focus on the "practical effect" of a challenged statute in operation. *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, ____ U.S. ____, 64 L. Ed. 2d 702, 712 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, ____ U. S. ____, 100 S. Ct. 1223, 1234 (1980). Montana's tax has not hindered interstate commerce in practice, and it has fallen even-handedly on all commerce and all parties concerned, whether located outside the state or within its borders. Since trial is not required to determine either point, the tax should therefore be upheld.

B. States are entitled to wide latitude in gauging the present and future impact costs of developing nonrenewable resources.

Although the Commerce Clause imposes a rule of fairness, it does not require state taxes affecting interstate commerce to be narrowly constrained by a precise calculation of the burdens imposed by that commerce.

> Complete fairness would require that a state tax vary with every factor affecting appropriate compensation . . . These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision' [citation omitted].

Evansville-Vanderburgh Airport Authority District v. *Delta Airlines, Inc.*, 405 U. S. 707, 716 (1972), quoting *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546-547 (1950). The purpose of trial in this case could only be to substitute "precision" for rough approximation, and thereby to constrict the legislative judgment of the state in gauging the present and future magnitude of coal development impacts. The Court has been invited to make this substitution before, and has declined. In *Capitol Greyhound* v. *Brice*, appellants argued that Maryland road taxes should more precisely correlate with actual road use, determined as a factual matter. The Court recognized the "infirmities" of Maryland's taxing formula, but observed that "we are by no means sure that the remedies suggested by appellants would not bring about greater ills." 339 U. S. at 546.

In the most recent case, faced with Minnesota's judgment that plastic nonrefillable milk containers posed a large enough environmental hazard to justify a total ban, the Court applied a "clearly excessive" standard to the state's assessment, and upheld the ban. *Minnesota* v. *Clover Leaf Creamery, supra,* 49 USLW at 4115-4116. If anything, the standard in this case should be even less restrictive, since the subject is a tax rather than an absolute ban on one form of commerce, and since the legislative judgment in question—Montana's assessment of the environmental, social and economic hazards of coal mining on a massive scale—covers an area much less susceptible to precise measurement. But under any standard, the Court can safely defer to Montana's judgment in this case, knowing that the practical effect of Montana's tax has been neither to hinder interstate commerce nor to discriminate against it.

Appellants argue that to uphold Montana's tax without trial in this case will be to give states unlimited discretion to raise taxes, even to 1000% or 2000%. Appellants' brief at 24. But states are not empowered to put excessive burdens on commerce; if and when Montana actually starts to constrict commerce in coal, either through taxes or otherwise, review of its legislative judgment will be available.

C. How large the burdens of present and future coal development will be on Montana's environment and economy is a question particularly suitable for legislative judgment, since the costs cannot be sharply quantified.

Some effects of coal development can be predicted, and the cost of repairing them can be quantified. But other costs are necessarily speculative. The extent to which groundwater will be polluted, and the cost of purifying it or obtaining another water source in an arid state; the long-term health effects of increased pollution, both from mining and from associated boom town growth, and the resulting burden on Montana's health facilities; the effect on wildlife (including among other species the trout, elk, and ducks long prized by Montana sportsmen) of temporary or permanent disruption of the land

surface and associated streams: all these are impossible to estimate today with any reasonable precision.[9]

Also, the "cost" of even some well-known impacts depends on highly subjective judgments. A generation's worth of open strip mines, blasting, and fugitive dust in the atmosphere will be felt—and valued—very differently by an adjacent Montana rancher, by a Chicago tourist on a fishing vacation, and by appellants. The state's sense of subjective value, decided through its political process, will determine how hard it tries to avoid or repair those impacts, and thus how much it spends. One party might feel that the state's intended efforts are excessive, and another that they are inadequate, but trial now will not resolve their differences.

Finally, there are environmental and social impacts which are simply not yet known, and therefore not predictable at all. During World War II, for example, no one would have predicted that breathing asbestos in a Navy shipyard would cause a virulent form of cancer. What the analogous consequences of coal mining might be, or even whether they exist, is uncertain; but it is certain that, whatever they are, Montana will bear them.

Appellants attack Montana's use of a trust fund mechanism, arguing that by setting aside revenues for future use, the state concedes that it does not presently need them, and thus that there is no "fair relation" of tax revenues to governmental needs. Appellants' brief at 11, 30. Amici submit that the contrary is true. That Montana chooses to set aside substantial revenues in a trust fund, against the day when impacts will be better known, reflects its awareness of the present uncertainty; and it is a highly appropriate response by the state to the fact of that uncertainty. It, or a similar mechanism, may be the *only* way a state can "fairly relate" the tax on extraction of a nonrenewable resource to the impacts which that extraction will have over time. The Court should specifically endorse the

---

[9] Experience is no guide. As the Montana Supreme Court pointed out below, strip mining in Montana has increased more than four-fold in the last ten years. 615 P. 2d at 849-850. Today's experience is therefore based on yesterday's much lower volume of extraction.

state's use of a trust fund, fed with revenues from the extraction of a non-renewable resources, to help insure that extraction costs which today are uncertain or unknown will be able to be met as they are recognized, both during the extraction process and later, after the resource—and the taxable activity—is irretrievably exhausted.

II. NO NATIONAL ENERGY POLICY CONFLICTS WITH MONTANA'S IMPOSITION OF A SEVERANCE TAX ON COAL DESIGNED TO COMPENSATE THE STATE FOR THE EFFECTS OF COAL MINING. FEDERAL POLICIES TOWARD ENERGY ARE EXPRESSED IN STATUTES WHICH SHOULD BE INTERPRETED BY THIS COURT.

Federal energy policy is not singular, it is diverse. Federal policies affecting energy production and use have been expressed in dozens of statutes, some of which appellants discuss, but most of which they ignore.[10] The crux of appellants' argument is that the Montana tax, because it increases the price to the user of Montana coal, interferes with what they contend is a Federal policy that favors the use of "low sulfur western coal over alternate forms of energy."[11] To prevail, appellants must show that such a policy exists, that Congress intended that policy to be effectuated, in part, by keeping the price of low sulfur western coal low, and that a tax that adds to the price of the coal the social, economic, and environmental costs of coal mining frustrates that policy. Appellants fail to meet that burden.

A. Federal policies toward energy are stated in many statutes designed to achieve diverse objectives. No uniform policy exists.

Historically, United States policy with regard to energy has been neither consistent nor coherent. For example, Federal laws have, at different times during this century, alternately

---

[10] *Compare*, Brief of appellants at 5, n.*, 36-39, with list in n.16, *infra*.

[11] *Id.*, at 35.

discouraged and encouraged the importation of foreign oil.[12] For most of the last three decades, federal laws had the effect of massively subsidizing the use of conventional forms of energy;[13] recently, new laws have emphasized subsidies for less conventional sources of energy,[14] while allowing the price of conventional sources to rise to market levels in order to encourage increased production and to discourage consumption.[15] Since the oil embargo of 1973, Congress has enacted at least 26 separate laws dealing specifically with

---

[12] *See generally* A. Sampson, THE SEVEN SISTERS at Ch. 8 (1975); ENERGY FUTURE at Ch. 2 (R. Stobaugh and D. Yergin, ed. 1979).

[13] *See generally* AN ANALYSIS OF FEDERAL INCENTIVES USED TO STIMULATE ENERGY PRODUCTION, Battelle Laboratories (1980). Battelle estimates that over $252 billion have been spent since 1918 to promote the production of oil, coal, natural gas, electricity and the construction of nuclear powerplants. *Id.*, Executive Summary at Table 1.

[14] *See, e.g.*, Crude Oil Windfall Profits Tax Act of 1980, Pub. L. 96-223, Title II, 94 Stat. 229 (1980); Energy Conservation and Production Act, Pub. L. 94-385, § 461, 90 Stat. 1125 (1976); Energy Policy and Conservation Act, Pub. L. 94-163, §§ 102, 363, 89 Stat. 871 (1975); Energy Security Act, Pub. L. 96-294, Titles I, II, V, 94 Stat. 611 (1980); Energy Tax Act of 1978, Pub. L. 95-618, §§ 221, 402, 92 Stat. 3174 (1978); Federal Nonnuclear Research and Development Act of 1974, 42 U. S. C. §§ 5905-5907; Geothermal Energy Research, Development, and Demonstration Act, 30 U. S. C. §§ 1141-1145, 1164; Magnetic Fusion Energy Engineering Act of 1980, 42 U. S. C. §§ 9301-9312 (1980); National Energy Conservation Policy Act, 42 U. S. C. §§ 8224, 8231, 8244; National Energy Extension Service Act, 42 U. S. C. § 7010; Ocean Thermal Energy Conversion Act, Pub. L. 96-310, § 10, 94 Stat. 941 (1980); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U. S. C. § 5566; Solar Heating and Cooling Demonstration Act of 1974, 42 U. S. C. § 5517; Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U. S. C. § 5594; Wind Energy Systems Act of 1980, Pub. L. 96-345, § 14, 94 Stat. 1139 (1980) *See, generally*, ENERGY POLICY IN PERSPECTIVE at 564-87 (Goodwin, ed. 1980).

[15] *See, e.g.*, Executive Order 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981) (Decontrol of Crude Oil and Refined Petroleum Products); Pacific Northwest Electric Power Planning and Conservation Act, 16 U S. C. § 839 *et seq.*; Public Utilities Regulatory Policies Act of 1978, 16 U. S. C. § 2601 *et seq.* *See, generally*, ENERGY POLICY IN PERSPECTIVE, *supra* n. 14, at 564-587.

energy production and use.[16] They cover a wide variety of topics, but express no coherent policy.

Appellants would infer from three federal statutes a general policy favoring low-sulfur western coal at low cost although none of those statutes state any such policy specifically.[17] There is no reason, however, to examine only a few statutes relating to energy and ignore the majority in the endeavor to determine what, if any, general federal policy exists.

There are three themes that run, more or less consistently, through the various statutes that express federal energy concerns. They are the promotion of domestic energy production

---

[16] Crude Oil Windfall Profits Tax Act of 1980, Pub. L. 96-223, 94 Stat. 229 (1980); Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352; Emergency Energy Conservation Act of 1979, 42 U.S.C. §§ 8501-8541; Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760h; Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1125 (1976); Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891; Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871 (1975); Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (1980); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 (1974); Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174 (1978); Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-5917; Geothermal Energy Research, Development, and Demonstration Act of 1974, 30 U.S.C. §§ 1101-1164; Magnetic Fusion Energy Engineering Act of 1980, 42 U.S.C. §§ 9301-9312 (1980); National Energy Conservation Policy Act, 42 U.S.C. §§ 8211-8278; National Energy Extension Service Act, 42 U.S.C. §§ 7001-7011; Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432; Ocean Thermal Energy Conversion Act, Pub. L. 96-310, 94 Stat. 941 (1980); Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289 (1978); Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (1978); Solar Energy Research, Development, and Demonstration Act of 1974, 42 U.S.C. §§ 5551-5566; Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. §§ 5501-5517; Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U.S.C. §§ 5581-5594; Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1201; Wind Energy Systems Act of 1980, Pub. L. 96-345, 94 Stat. 1139 (1980).

[17] The statutes upon which appellants rely do not establish even a general policy in favor of western low sulfur coal at low cost. *See* Section II.C., *infra*.

from all sources,[18] the encouragement of improved efficiency in energy use,[19] and the assurance that energy production and use

---

[18] *See e.g.*, Crude Oil Windfall Profits Tax of 1980, Pub. L. 96-223, Title II, 94 Stat. 229 (1980); Department of Energy Organization Act, 42 U. S. C. §§ 7111-7112; Energy Conservation and Production Act, Pub. L. 94-385, §§ 121-124, 90 Stat. 1125 (1976); Energy Reorganization Act of 1974, 42 U. S. C. § 5801; Energy Policy and Conservation Act, Pub. L. 94-163, §§ 101-106, 89 Stat. 871 (1975); Energy Security Act, Pub. L. 96-294, Titles I, II, IV, V, 94 Stat. 611 (1980); Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, § 2, 88 Stat. 246 (1974); Energy Tax Act of 1978, Pub. L. 95-618, §§ 221, 402, 92 Stat. 3174 (1978); Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U. S. C. §§ 5901-5904; Geothermal Energy Research, Development, and Demonstration Act, 30 U. S. C. §§ 1101-1164; Magnetic Fusion Energy Engineering Act of 1980, 42 U. S. C. §§ 9301-9312 (1980); National Energy Conservation Policy Act, 42 U. S. C. §§ 8271-8278; National Energy Extension Service Act, 42 U. S. C. §§ 7003-7007; Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3301-3432; Ocean Thermal Energy Conversion Act, Pub. L. 96-310, §§ 2-10, 94 Stat. 941 (1980); Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, § 2, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, § 102, 92 Stat. 3289 (1978); Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, §§ 210, 401-408, 92 Stat. 3117 (1978); Surface Mining and Reclamation Act of 1977, 30 U. S. C. §§ 1201-1202 (1977); Solar Photovoltaic Energy Research, Development, and Demonstration Act of 1978, 42 U. S. C. §§ 5581-5594.

[19] Crude Oil Windfall Profits Tax Act of 1980, Pub. L. 96-223, Title II, 94 Stat. 229 (1980); Department of Energy Organization Act, 42 U. S. C. §§ 7111-7112; Emergency Energy Coordination Act of 1979, 42 U. S. C. §§ 8501-8541; Emergency Petroleum Allocation Act, 15 U. S. C. §§ 751-760h; Energy Conservation and Production Act, Pub. L. 94-385, §§ 301-451, 90 Stat. 1125 (1976); Energy Policy and Conservation Act, Pub. L. 94-163, Titles III, V, 89 Stat. 871 (1975); Energy Reorganization Act of 1974, 42 U. S. C. § 5801; Energy Security Act, Pub. L. 96-294, Title V, 94 Stat. 611 (1980); Energy Tax Act of 1978, Pub. L. 95-618, §§ 101, 210, 222, 231, 232, 233, 241, 242, 92 Stat. 3174 (1978); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U. S. C. § 5904; National Energy Conservation Policy Act, 42 U. S. C. §§ 8211-8261; National Energy Extension Service Act, 42 U. S. C. §§ 7003, 7007; Natural Gas Policy Act of 1978, 15 U. S. C. §§ 3301-3432; Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, §§ 2, 6, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, § 102, 92 Stat. 3289 (1978); Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (1978).

will not cause serious injury to the human environment.[20] In addition, federal laws and executive orders have recently stressed the importance of letting prices rise, both to reflect true market prices for energy and to allow the environmental and social costs of energy production to be internalized in energy prices.[21]

Most surprisingly, appellants fail to cite the Energy Security Act of 1980, Pub L. 96-294, 94 Stat. 611, Congress's most recent and one of its most comprehensive efforts to deal with energy problems on a broad scale. The Energy Security Act is a good illustration of the wide range of topics that Congress considers to be part of its approach to energy problems. The Act includes programs for synthetic fuels, § § 101-195; energy from biomass, § § 201-274; solar energy and energy con-

---

[20] *See, e.g.*, Department of Energy Organization Act, 42 U. S. C. §§ 7111-7112; Energy Conservation and Production Act, Pub. L. 94-385, § 402, 90 Stat. 1125; Energy Reorganization Act of 1974, 42 U. S. C. § 5801; Energy Security Act, Pub. L. 96-294, §§ 601-644, 94 Stat. 611 (1980); Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U. S. C. § 5901; Geothermal Energy Research, Development, and Demonstration Act, 30 U. S. C. § 1161; Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, § 2, 94 Stat. 2697 (1980); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, § 102, 92 Stat. 3289 (1978); Solar Heating and Cooling Demonstration Act of 1974, 42 U. S. C. § 5501; Surface Mining Control and Reclamation Act, 30 U. S. C. §§ 1201, 1251-1279; Wind Energy Systems Act of 1980, Pub. L. 96-345, § 2, 94 Stat. 1139 (1980). In addition to energy statutes with specific references to environmental protection, several environmental protection laws directly and indirectly affect energy conservation and production. *See, e.g.*, Clean Air Act, as amended, 42 U. S. C. §§ 7401-7642; Clean Water Act Amendments to the Federal Water Pollution Control Act, 33 U. S. C. §§ 1251-1376; National Environmental Policy Act of 1969, as amended, 42 U. S. C. §§ 4321-4361; Resource Conservation and Recovery Act of 1976, 42 U. S. C. §§ 6901-6987; Uranium Mill Tailings Radiation Control Act of 1978, 42 U. S. C. §§ 7901-7942.

[21] *See, e.g.*, H. Rep. No. 95-218, 95th Cong., 1st Sess., *reprinted in* 1977 U. S. CODE CONG. & AD. NEWS 593, 599 (Surface Mining and Reclamation Act); H. Rep. No. 95-294, 95th Cong., 1st Sess., *reprinted in* 1977 U. S. CODE CONG. & AD. NEWS 1077, 1150-51 (Clean Air Act Amendments of 1977); *cf.*, S. Rep. No. 95-141, 95th Cong., 2d Sess., *reprinted in* 1978 U. S. CODE CONG. & AD. NEWS 7660, 7679 (Public Utilities Regulatory Policies Act).

servation, § § 501-597; geothermal energy, § § 601-744; and the study of environmental problems, § § 701-712.

B. Federal statutes relating to energy generally, and coal in particular, firmly link development with environmental considerations, and with prices high enough to meet multiple goals.

The theme of environmental protection found in federal statutes relating to energy is particularly relevant, because the regulatory standards imposed by the Congress to protect the environment frequently have the effect of raising the price of energy resources. Congress has recognized that normal economic forces—supply, demand, price, and competition—do not operate to protect the environment, and consequently regulatory measures are necessary.[22] Although the effect of those measures may be to increase the price of energy, the higher prices more accurately communicate to energy consumers the real cost to the Nation of the energy they use. As the then Chairman of the Council on Wage and Price Stability explained in Congressional testimony:

> With our recently enhanced recognition of the many ways in which unrestrained economic activities may impose damage on the environment. . . . it is widely recognized that economic efficiency alone requires that all pertinent social costs, internal and external, be levied in one way or another on the particular acts of production or consumption causally responsible for them. This will eliminate the subsidization; by confronting consumers with prices reflecting the full social costs of supplying them, it will ensure that no activities will be carried on whose *total* incremental costs exceed their benefits. And it will ensure, also, that production will be carried on by methods that minimize *total* costs, rather than only those costs that happen to fall on the producer.[23]

---

[22] *See* sources listed supra, n. 21.

[23] Executive Branch Review of Environmental Regulations; Hearing before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works of the United States Senate, 96th Cong., 1st Sess. 406 (Statement of Alfred Kahn). *See also* Allen Kneese and Charles Schultze, POLLUTION PRICES AND PUBLIC POLICY (1975) at 5-6.

This policy of internalizing the environmental and social costs of energy production and use is applied to coal by many federal statutes.[24]

The federal statute most directly concerned with the mining of coal is the Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. §§ 1201 *et seq.* (Supp. III 1979), which appellants unaccountably do not discuss. The Surface Mining Act explicitly states Congress's intention to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy", § 102(f), 30 U. S. C. § 1202(f), and to "assure that surface coal mining operations are so conducted as to protect the environment," § 102(d), 20 U. S. C. § 1202(d). In achieving this goal, Congress stated that "the primary governmental responsibility" in this area "should rest with the States." § 101(f), 30 U. S. C. § 1201(f). Congress expressly authorized states to adopt standards regulating surface mining which are more stringent (and therefore more costly to comply with) than the minimum standards set by the Act.[25] Thus, Congress has acknowledged and approved state policies fashioned to remedy environmental harms which increase the price of coal.[26]

C. The statutes relied upon by Appellants do not manifest a Congressional policy favoring low sulfur western coal at the lowest possible price.

Appellants rely specifically upon three statutes to support their contention that federal policy requires that the price of Montana coal be kept as low as possible. The most directly

---

[24] *See, e.g.* Surface Mining Control and Reclamation Act, *supra;* Federal Coal Leasing Amendments Act, 30 U. S. C. §§ 181 *et seq.;* Federal Land Policy and Management Act of 1976, 43 U. S. C. § 1701 *et seq.;* Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 *et seq.*

[25] 30 U. S. C. § 1225. The Clean Air Act allows the states similar discretion in deciding whether to meet or exceed Federal standards. 42 U. S. C. § 7416.

[26] Moreover, in managing its own coal resources, the federal government is required by law to seek maximization of its economic returns rather than to set low prices to promote development. Federal Coal Leasing Amendments Act, *supra* n. 20, 30 U. S. C. §§ 201, 207 (1975). This policy was adopted in response to evidence that too much federal coal was being leased at too low a price. H. Rep. No. 94-681, 94th Cong., 1st Sess., 8-12 (1975).

relevant of those statutes, the Clean Air Act, in fact strongly indicates that Congress did *not* intend to favor western coal. The promulgation of uniform national emission standards by the Environmental Protection Agency under the original version of the Act, Pub. L. 91-604, 84 Stat. 1676 (1970), resulted in low sulfur western coal enjoying a significant advantage over high sulfur eastern coal. H.Rep.No. 294, 95th Cong., 1st Sess., 184-87 (1977). In reaction to this situation, Congress amended the Act in 1977 to "strengthen incentives for new plants to use locally available coal." *Id.* at 166. The clear purpose of this change was to eliminate the advantage enjoyed by western coal, not to promote its use at cheap prices.[27]

The other statutes relied upon by appellants simply do not address either the price or the geographical origin of coal. Rather they emphasize a variety of mechanisms to reduce consumption of oil and natural gas.[28]

D. Even assuming arguendo that there is a discernible policy to favor coal development over other values and alternatives, Montana's tax should be upheld without trial.

As discussed above in the context of the Commerce Clause, Montana's tax offers no hindrance in practice to the interstate flow of its coal. Thus, even if federal policy favors the

---

[27] *See*, Ayres & Doniger, *New Source Standard for Power Plants II: Consider the Law*, 3 HARV. ENV. L. REV. 63, 66-67 (1979).

[28] First, the Energy Policy and Conservation Act of 1975, 42 U. S. C. §§ 6201 *et seq.* (1976 & Supp. III 1979), does not mention coal in its statement of purposes. Instead, like the Energy Security Act, it establishes an assortment of programs dealing with energy conservation, Title III oil prices, Title IV, and emergency planning, Title II. Appellants emphasize one section, which merely strengthens the requirement in an earlier statute that certain gas and oil burning facilities be converted to coal. Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 § 2, 15 U. S. C. § 792 (1976 and Supp. III 1979). The earlier statute was intended to help meet the need for fuels "in a manner which is consistent, to the fullest extent practicable, with existing National commitments to protect and improve the environment." § 1(b), 15 U. S. C. § 791(b).

The second statute relied upon by appellants, the Power Plant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289, 42 U. S. C. §§ 8301 *et seq.* (Supp. III 1979), likewise incorporates multiple purposes. It focuses on reduction of oil imports through conservation.

development and use of western low sulfur coal, Montana's tax does not constitute "substantial frustration" of that policy because Montana coal is being developed and used.

A trial on this question would be inappropriate, for the issue is whether the Montana tax "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). What the "purposes and objectives of Congress" are with respect to energy is a question of law to be resolved by reference to statutes and legislative history, not a factual issue to be resolved at trial.

If the federal policy appellants claim to find—favoring western coal development at low cost over other considerations—were in fact the clear intention of Congress, the question would remain as to what level of state taxes could be imposed without substantially impairing that policy. Appellants argue that Congress has implicitly set such a limit, and seek trial to determine it. But Congress during 1980 failed to pass legislation that would have set explicit limits on state coal severance taxes. H.R. 6625, H.R. 6654, H.R. 7163, 96th Cong. 2d Sess. (1980). Similar legislation is now pending. S. 178, 97th Cong., 1st Sess. (1981). Thus, to justify a trial, appellants seek to persuade this Court that Congress has already done by implication what it has chosen not to do expressly. Appellants would then have a trial court do exactly what Congress has declined to do: determine what specific state tax rate is appropriate.

In effect, appellants ask for special attention in this case because the subject is energy. They stress the Arab oil embargo of 1973, the resulting atmosphere of energy crisis, and the spectre of "energy rich states" exploiting their dependent kin. Appellants' brief at 24-25. But the rhetoric of energy crisis is nothing new, even in this exact legal context. Nine states raised exactly these same arguments almost sixty years ago in *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245 (1921). The debate over energy policy is of vital importance, but resolution of this case does not require the development of new or *ad hoc* constitutional principles.

CONCLUSION

The record before the Court in this case demonstrates that Montana's coal severance tax is non-discriminatory, and that in practical effect it is not hindering interstate commerce in Montana coal. The tax is therefore constitutional.

In the absence of any practical burden on interstate commerce, no set of facts could be proven at trial that would show the burden of the tax to be clearly excessive, in relation to the burdens imposed on the state. The "fairly related" test is therefore satisfied. Trial on the issue would *unduly and unnecessarily restrict* the legislative judgment of the state in assessing the present and future burdens of coal extraction, without leading to any more satisfactory precision in quantifying those burdens.

Montana's use of a trust fund to set aside revenue for future impacts is a highly appropriate response to the problems of uncertainty and unpredictability, and should be encouraged.

To the extent that any conherent national policy with respect to coal can be discerned, it is to balance coal development with other energy sources and with environmental factors, allowing energy prices to reflect the full cost of the resource including the cost of environmental protection, and granting wide latitude to the states to set the conditions for coal development. Montana's tax is wholly consistent with that policy. Even if the policy were otherwise, the demonstrated lack of interference with the flow of Montana coal in interstate commerce is enough to show that the tax is not operating to frustrate the development and use of Montana coal throughout the nation.

The judgment below should therefore be affirmed.

Respectfully submitted,

DAVID B. ROE
Counsel of Record
PATRICIA L. WELLS
2606 Dwight Way
Berkeley, California 94704
(415) 548-8906
JONATHAN LASH
1725 I Street, N.W.
Washington, D.C. 20006
(202) 223-8210
Attorneys for Amici Curiae

Dated: February 23, 1981

Appendix

DESCRIPTION OF AMICI

1. Amicus Environmental Defense Fund, Inc. (EDF) is a not-for-profit, public interest membership corporation, organized and existing under the laws of the state of New York, with its principal place of business located at 475 Park Avenue South, New York, N.Y. 10016, and with additional offices in Washington, D.C., Denver, Colorado, and Berkeley, California. EDF has more than 45,000 members nationwide.

EDF is dedicated to the protection and rational use of natural resources and to the preservation and enhancement of the human environment. It and its staff of scientists, economists, and lawyers seek to pursue these goals through scientific research, monitoring, and administrative and judicial action on behalf of itself and its members.

2. Amicus Natural Resources Defense Council, Inc. (NRDC)—a national environmental organization with more than 44,000 members residing in all states and territories, as well as abroad—has as one of its principle goals the preservation and wise use of the natural resources of the earth, including those resources such as clean air and clean water held in common by all people. NRDC has sought, through the advocacy of effective federal, state, and local laws, to assure that those commonly held resources are protected.

3. Amicus Sierra Club is a non-profit corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at 530 Bush Street, San Francisco, California 94108. The Sierra Club is a national conservation organization having approximately 188,000 members.

The objectives of the Sierra Club include conservation, the protection and sound management of natural resources, and the preservation and enhancement of our environment. The stated corporate purposes of the Sierra Club are:

> To enhance and protect by all lawful means the natural resources and human environment of the United States

and the earth in general; to explore, enjoy, and preserve the scenic resources of the United States and its forests, waters, wildlife and wilderness; to undertake and to publish scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state forests, parks, monuments, and other natural resources of especial scenic beauty and to enlist public interest and cooperation in protecting them.

For many years the Sierra Club has fostered these objectives by its activities, including the representation of its members and persons similarly situated before courts and administrative agencies.

NO. 80-581

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

--against--

STATE OF MONTANA, et al.,

Appellees,

On Appeal From The Supreme Court
Of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS

ROBERT T. STEPHAN
Attorney General of Kansas

BRUCE E. MILLER
Deputy Attorney General
of Kansas

Kansas Judicial Center
Second Floor
Topeka, Kansas 66612
(913) 296-2215

Attorneys for Kansas

NO. 80-581

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

--against--

STATE OF MONTANA, et al.,

Appellees,

On Appeal From The Supreme Court
Of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS

ROBERT T. STEPHAN
Attorney General of Kansas

BRUCE E. MILLER
Deputy Attorney General
of Kansas

Kansas Judicial Center
Second Floor
Topeka, Kansas 66612
(913) 296-2215

Attorneys for Kansas

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE.....	2
THE DECISION BELOW SHOULD BE REVERSED.....	6
CONCLUSION.....	10

TABLE OF AUTHORITIES

Page

CASES

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)..... 8

Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)..... 6

Hope Gas Co. v. Hall, 274 U.S. 284 (1927)..... 6

Oliver Iron Co. v. Lord, 262 U.S. 172 (1923)..... 6

STATUTES

Montana Code Annotated, 15-35-101, et seq. 5

OTHER AUTHORITY

Survey of Electric Utility Demand for Coal 197-322, 336-43 (Argonne National Laboratory, August 1979)..... 3

NO. 80-581

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

--against--

STATE OF MONTANA, et al.,

Appellees,

On Appeal From The Supreme Court
Of the State of Montana

BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS

The State of Kansas, by and through its Attorney General, Robert T. Stephan, appears parens patriae on behalf of its citizens and files this brief pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Long-term coal contracts between Kansas electric utility companies and Wyoming coal producers require the purchase of hundreds of millions of tons of low-sulphur coal from Wyoming during the remainder of this century. One such utility alone, The Kansas Power and Light Company, is committed to purchasing 276,136,000 tons of Wyoming coal during the remainder of a contract expiring in the

year 2013.

Annual demand for coal to serve new power plants in Kansas -- those planned but not yet in operation -- has been projected to equal more than ten million tons by 1992, with total shipments in that year of coal from Wyoming to Kansas amounting to more than sixteen million tons. See Argonne National Laboratory, Survey of Electric Utility Demand for Coal 197-322, 336-43 (August 1979).

Kansas utilities have been driven to look to Wyoming coal, in large part, by Federal clean air and energy statutes. Coal mined in the western states -- principally Wyoming and Montana -- meets air-quality requirements of Federal law far better than coal from any other region. These two states together have 68

percent of the nation's low-sulphur coal. At the same time, utilities in Kansas and elsewhere are now under great pressure, again principally from Federal statutes, to use coal instead of other fuels. As a practical matter, Kansas utilities can fulfill their needs for energy resources and their obligations to their customers only through the use of such coal.

As one consequence of these Federal mandates, the citizens of Kansas are captives of state tax policies in other states which are, therefore, in a position to take extraordinary and unreasonable economic advantage of their plight. Wyoming and its local subdivisions presently impose large severance taxes on the value of this coal, amounting to ap-

proximately 17-1/2 percent of value. Since fuel-related costs of electricity generation flow into consumers' monthly bills, these taxes are ultimately borne by the consumers of electric energy in, among other places, Kansas. The net effect of such taxes is to shift millions of dollars from Kansas consumers to the Wyoming treasury.

Massive amounts are involved. At present tax rates and at the current prices of coal, about $1.00 per ton is paid by Kansas Power and Light to the State of Wyoming in severance taxes. As the price of the coal escalates, of course, the amount of the tax will increase as well, even assuming the Wyoming tax rate remains unchanged. By 1987, it is estimated at least $26.5 million per annum will be

shifted from Kansas consumers to the State of Wyoming through these taxes.

The questions presented in this appeal arise out of a constitutional challenge to the 30 percent Montana Coal Severance (Montana Code Annotated, 15-35-101 et seq.), but they have equal application to Wyoming's power to continue, and potentially to increase, its taxes. They are, therefore, of great interest to the citizens of Kansas.

THE DECISION BELOW SHOULD BE REVERSED

To avoid burdening the Court with unnecessary argument, we simply subscribe to the arguments set forth in appellants' Brief on the Merits, adding the following comments:

1. The Montana Supreme Court held that the Commerce Clause imposes

no limit on the power of the states to tax energy resources destined for immediate delivery to other states, relying on a series of older cases, citing Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); and Hope Gas Co. v. Hall, 274 U.S. 284 (1927). The principal issue presented by appellants' Commerce Clause claim is one which has not been examined here for more than 50 years. Both practical circumstances and constitutional doctrines have changed markedly over the intervening decades They strongly recommend reconsideration of those old decisions.

No one in this proceeding has suggested the Commerce Clause deprives the states of their power to tax extraction of energy or other re-

sources located within their borders, at least to the extent that such taxes bear some fair relation to services and protection provided by the state. At the same time, excessive taxation which falls principally on resources destined for other states -- taxation all out of proportion to the legitimate needs of the taxing state -- has serious effects on consumers in those states and on our nation-wide economy. The facts of this case bring these effects into vivid focus. The practical effect is that citizens of coal-poor states where electric generation is coal-fired -- such as Kansas -- may effectively be held hostage to those which happen to be rich in that mineral resource. It is clear excessive taxes, such as the Montana tax is alleged to be, are antithetical to the

principles underlying the Commerce Clause and should, in appropriate circumstances, be struck down under that Clause.

The substantive Commerce Clause rules set out in cases such as Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), provide an appropriate, workable means to safeguard the Commerce Clause interests involved while maintaining the vital interests of the affected states to cover the costs of services which must be provided. If those rules pertain, they must have teeth, at least to the extent of permitting plaintiffs to prove, in appropriate circumstances, that they have been violated. Appellants here should have been given that opportunity.

2. The Montana Supreme Court also held it could discern no Federal policy which could be frustrated by Montana's tax. That holding, derived without any factual record, does not conform to practical reality. The electric utility companies serving Kansas are among the leaders of their industry in converting electrical generation from oil to coal-fired. In doing so, the utilities have done more than any other institution to move the nation from dependence on foreign oil toward secure, domestic fuels. This conversion has taken place in response to the mandates of a clear national policy.

Excessive taxes manifestly have the potential to frustrate Federal policies by making coal unnecessarily expensive, thereby discourag-

ing its production and use. At some point, excessive taxes should be held to be contrary to national policies which encourage, require, or mandate the use of coal. Appellants have argued that Montana's tax has reached that point. They should be given an opportunity to prove their allegations.

CONCLUSION

For the reasons set forth above, and for those contained in the appellants' Brief, this Court should reverse the opinion and judgment of the court below and remand the matter for trial.

DATED: January 23, 1981

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General
of Kansas

BRUCE E. MILLER
Deputy Attorney
General of Kansas

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing BRIEF AMICUS CURIAE OF THE STATE OF KANSAS IN SUPPORT OF APPELLANTS were mailed by depositing same in the United States Mail, first class postage prepaid, this 23 day of January 1981, to:

HON. MICHAEL T. GREELY, Attorney General of Montana, State Capitol, Helena, Montana 59601; WILLIAM J. CARL, ESQ., Senior Counsel, Montana Power Company, 40 East Broadway, Butte, Montana 59701; ROGERS & WELLS, Attorneys at Law, 200 Park Avenue, New York, New York 10166; HON. MARK WHITE, Attorney General of Texas, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711; LEO F. J. WILKING, ESQ., Special Assistant Attorney General for State Tax Commissioner, State Tax Department, State Capitol, Bismarck, North Dakota 58505.

Bruce E. Miller

Bruce E. Miller
Deputy Attorney General
of Kansas

No. 80-581

IN THE

Supreme Court of the United States

October Term, 1980

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc. and Western Energy Company,

Appellants,

against

State of Montana, Thomas L. Judge, Governor of Montana, Mary Craig, Director of the State Department of Revenue, and David M. Lewis, Director of Administration and State Treasurer,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF MINNESOTA, IOWA AND WISCONSIN

WARREN SPANNAUS
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Special Assistant
Attorney General
515 Transportation Bldg.
St. Paul, Minnesota 55155
(612) 296-7537

Of Counsel:
KAREN G. SCHANFIELD
Special Assistant
Attorney General
515 Transportation Bldg.
St. Paul, Minnesota 55155
(612) 296-8998

THOMAS J. MILLER
Attorney General
State of Iowa
BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-581

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc. and Western Energy Company,

Appellants,

against

State of Montana, Thomas L. Judge, Governor of Montana, Mary Craig, Director of the State Department of Revenue, and David M. Lewis, Director of Administration and State Treasurer,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF MINNESOTA, IOWA AND WISCONSIN

POSITION OF AMICI CURIAE

The States of Minnesota, Iowa, and Wisconsin, Amici Curiae in this proceeding, continue to rely upon the position and arguments set forth in their Brief in Support of Jurisdictional Statement. Amici Curiae maintain, as do Appellants, that the Montana Court erred in determining that, as a matter of law, the Montana Coal Severance Tax does not violate the Supremacy Clause of the United States Constitution. The thirty percent Montana Coal Severance Tax seriously undermines the federal policies and enactments which favor increased coal consumption in contravention of the Supremacy Clause. Amici Curiae thus join the Appellants in urging that the judgment below be reversed and the action remanded for trial.

Dated: January 20, 1981.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
KENT G. HARBISON
Counsel of Record
Special Assistant
Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-7537

Of Counsel:
KAREN G. SCHANFIELD
Special Assistant
Attorney General
515 Transportation Bldg.
St. Paul, Minnesota 55155
Telephone: (612) 296-8998

THOMAS J. MILLER
Attorney General
State of Iowa
BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

No. 80-581

JAN 26 1981

Supreme Court of the United

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,
Appellants,

vs.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, AND DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICI CURIAE OF THE STATES OF NEW JERSEY AND MICHIGAN IN SUPPORT OF APPELLANTS

STEPHEN SKILLMAN
Assistant Attorney General
State House Annex
Trenton, New Jersey 08625
(601) 292-4965

CLAUDE E. SALOMON
Deputy Attorney General
1100 Raymond Boulevard
Newark, New Jersey 07102
(201) 648-4734

JOHN J. DEGNAN
Attorney General of New Jersey

FRANK J. KELLEY
Attorney General of Michigan

ROBERT A. DERENGOSKI
Solicitor General of Michigan

ARTHUR E. D'HONDT
JOHN M. DEMPSEY
Assistant Attorneys General
1000 Long Boulevard, Suite 11
Lancing, Michigan 48910
(517) 373-7484

January 21, 1981

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT—A State tax on an activity which "substantially affects" interstate commerce should be subject to scrutiny under a Commerce Clause test	4
CONCLUSION	8

Cases Cited

Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979)	5
Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950)	6
Carter v. Carter Coal Co., 298 U.S. 238 (1936)	4
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)	3, 6
Evansville Airport v. Delta Airlines, Inc., 405 U.S. 707 (1972)	7
Exxon Corp. v. Wisc. Dep't of Rev., 100 S. Ct. 2109 (1980)	4, 5
Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)	4
Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977)	5
Mobil Oil Corp. v. Commissioner of Taxes of Vt., 100 S. Ct. 1223 (1980)	5, 7
Norfolk & W. R. Co. v. Tax Comm'n, 390 U.S. 317 (1968)	7

PAGE

Oliver Iron Co. v. Lord, 262 U.S. 172 (1923) 4

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 5

Wash. Rev. Dep't v. Stevedoring Ass'n, 435 U.S. 734 (1978) 6

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,
Appellants,

vs.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, AND DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,
Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF AMICI CURIAE OF THE STATES OF NEW JERSEY AND MICHIGAN IN SUPPORT OF APPELLANTS

Interest of the Amici

New Jersey is an energy consuming state. In the past, its electric utilities have derived a substantial portion of

their power from oil. However, most recently, New Jersey has been forced by rising costs and Federal energy policy to look to coal as the generation source of electric power. A combination of economics and Federal energy policy are expected to continue to induce a substantial rise in the use of coal by New Jersey and other Northeastern States.

New Jersey utilities have historically not used coal from Montana and the Rocky Mountain area since rail transportation has always added a prohibitive cost factor to its use in the Northeast. New Jersey coal sources are West Virginia, Virginia and Pennsylvania, with a smaller amount coming from Kentucky and Georgia. In 1979, New Jersey utilities purchased over two millions tons of coal.* New Jersey has also been increasing its consumption of power generated by coal. The most recent figures indicate that New Jersey electric utilities burned 300,000 more tons of coal in the period of January through August 1980 than they did through the same period of 1979. New Jersey expects that the coal consumption will steadily increase throughout the contemplated future.

Presently those states which supply the coal needs of New Jersey and the bulk of the Northeast have relatively low severance taxes on the production of this energy source. However, New Jersey fears that if this excessive Montana tax is allowed to stand, the Eastern coal-producing states will, in turn, raise their severance taxes to collect a similar amount from what is admittedly a vast source of revenue. This will result in unfettered interests of the energy producing states being pitted against those of the energy consuming states.

---

* This figure excludes and electric power (generated by coal) which was purchased by New Jersey utilities from utilities located in other states.

As a consumer state, New Jersey has an interest in seeing that an energy-rich state is not permitted to override national objectives for its own financial gain. Any constitutional rule which permits such assault by one state or group of states upon others frustrates national energy policy as well as striking at the heart of the policies underlying the Commerce Clause.

Nearly 1.5 billion dollars is the estimated direct cost to the State of Michigan over the next two decades from the Montana Coal Severance Tax. Presently levied on an annual shipment into Michigan of some 3.5 million tons of coal, the burden of the tax will continue to mount with an expected growth to 8 million tons imported. The injury to Michigan's economy from this massive transfer of revenues cannot be overstated.

Michigan has a vital interest, thus, in securing a strict scrutiny of this fetter on interstate commerce.

Summary of Argument

The Montana Supreme Court, in its opinion upholding the Montana Coal Severance Tax, relied strongly upon a line of cases decided by this Court over fifty years ago. These cases applied a "mechanical test" to determine whether the activity taxed by a state was "in" interstate commerce and therefore subject to scrutiny under the standards of the Commerce Clause. This "mechanical test" has been eroded by more recent decisions of this Court which have consistently held that activities which "substantially affect" interstate commerce must meet Commerce Clause standards. The Montana Coal Severance Tax is designed so that it substantially affects interstate commerce and therefore should be tested against the strictures defined in *Complete Auto Transit Inc.* v. *Brady,* 430 U.S. 274 (1977). Specifically, the Montana Supreme Court ruled

that the "fair relation" of state services to the amount of tax imposed was a matter of law, which did not require an evidentiary hearing to determine the true value of services provided by the state. Such a ruling in essence vitiates one point of the "four-pronged test" most recently affirmed by this Court in *Exxon Corp.* v. *Wisc. Dep't of Rev.*, 100 S. Ct. 2109, 2122 (1980) and is an erroneous interpretation of the law.*

ARGUMENT

A State tax on an activity which "substantially affects" interstate commerce should be subject to scrutiny under a Commerce Clause test.

The Montana Supreme Court stated that since the taxed activity was not yet "in" interstate commerce, that it need not examine the tax to determine whether it was a burden on interstate commerce. In this result, it relied principally upon a line of cases over fifty years old. *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *Oliver Iron Co.* v. *Lord*, 262 U.S. 172 (1923). The Court determined a state severance tax falls upon an activity which "precedes entry into interstate commerce." (Opinion 15, Appellants' Appendix 18a). This rationale was based upon the "mechanical test" expressed in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), which distinguished from the actual severance or production of a commodity and the sale and shipment of that commodity in interstate commerce. *Id.* at 303-03.

---

* This *amici curiae* brief deals solely with arguments raised under the Commerce Clause. *Amici* rely upon arguments raised by appellants on those issues under the Supremacy Clause.

Since that time, this Court has eroded the "mechanical test" to make clear that acts which "substantially affect" interstate commerce, whether "in" or "out" of commerce, raise questions under the Commerce Clause. *See, e.g., Arizona Public Service Co.* v. *Snead,* 441 U.S. 141, 150 (1979); *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U.S. 333, 350 (1977). A state's tax or regulation cannot be "immune" from Commerce Clause scrutiny by a state's tax claim that it applies to a purely local activity, *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 140 (1970). The distinctions employed by the court below are artificial and do not "establish a consistent and rational method of inquiry" which examines the "practical effect of a challeged tax." *See, Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.,* 100 S. Ct. 1223, 1224 (1980).

In addition to rejecting, out of hand, the claim that the Commerce Clause applies to a state severance tax, the court below also reached an erroneous conclusion regarding the standards imposed by the Commerce Clause as announced by this Court. This standard, as most recently articulated, requires that the court examine:

> "the 'practical effect' of the tax to determine whether it is 'applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'"

Exxon Corp. v. *Wisc. Dep't of Rev.,* 100 S. Ct. 2109, 2122 (1980), quoting *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 279. This four-pronged test to determine the constitutional validity of state taxes on activities which affect interstate commerce clearly sets forth four individual points of scrutiny, each of which must be met for the tax to pass constitutional muster.

However, the court below has held that the "fairly related" point may be determined as a matter of law, thus obviating the necessity for a factual hearing. In addition the court held that this point was satisfied as a matter of law, since Montana provides general governmental services to its citizens (including appellants). Such a holding fails to give the tax the "careful scrutiny" explicitly demanded by *Complete Auto Transit* to determine whether it is, in fact, fairly related to specific benefits and services alleged to be provided by the state. It thus glosses over one of the more repugnant aspects of the tax: that it was deliberately tailored to "export" the effects of the tax to the ultimate consumers of the energy source, all non-residents of the State of Montana. If the "fair relation" point of the four-pronged test is to have meaning, this requirement cannot be met by a simple declaration that general governmental services are always "fairly related" to a tax imposed.

No case has come to this Court where the "fair relation" point has been squarely raised in the context of a factual dispute. However, other decisions clearly indicate that this point is not to be disposed of in such a facile manner. *See, e.g., Washington Rev. Dep't* v. *Stevedoring Ass'n,* 435 U.S. 734, 750-51 (1978). As well, this Court has, in other contexts, determined what constitutes a "fair share" relationship between levies imposed and services provided. In that determination, the amount of the tax, not its formula, has been this Court's central concern. The amount must show a reasonable correlation to the privilege of use of the state's facilities, as well as reflect a uniform, fair and practical standard relating to public expenditures. Thus, a state highway toll on interstate carriers was examined and found to meet these requirements. *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, 545-47 (1950). As well, a state "head tax" on inter-

state airplane passengers was analyzed and held, on the basis of the record, not to be discriminatory, to be reasonably related to the services provided, and not excessive in light of the costs incurred by the taxing authorities. *Evansville Airport* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972).

States have broad discretion in fashioning apportionment formulas to determine what income may be taxed. *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt., supra.* However, if that state formula yields a grossly distorted result which cannot be explained by a factual analysis, it must fail. *Norfolk & W.R. Co.* v. *Tax Comm'n,* 390 U.S. 317, 326-27 (1968). As pointed out by appellants, Montana's tax revenues generated by this tax are in gross disproportion to the legitimate needs of the State. In fact, 50% of the revenues are not presently spent but are placed in a trust fund for future use. This excessive coal tax seriously affects those consuming states which depend on western coal. It may also be a dire portent of future divisions between energy-rich and energy-poor states. Therefore such taxes should be declared in violation of the Commerce Clause in appropriate circumstances.

CONCLUSION

For each of the reasons stated in the principal brief on the merits and the amici curiae brief, the judgment of the Montana Supreme Court should be reversed and the matter remanded for further proceedings.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey

STEPHEN SKILLMAN
Assistant Attorney General

CLAUDE E. SALOMON
Deputy Attorney General

FRANK J. KELLEY
Attorney General of Michigan

ROBERT A. DERENGOSKI
Solicitor General of Michigan

ARTHUR E. D'HONDT
JOHN M. DEMPSEY
Assistant Attorneys General

Dated: January 21, 1981

No. 80-581

FEB 23 1981

ALEXANDER L. STE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTERMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY, *Appellants,*

v.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER, *Appellees.*

On Appeal From The Supreme Court Of The State Of Montana

BRIEF *AMICUS CURIAE* OF THE STATE OF NEW MEXICO

JEFF BINGAMAN
Attorney General

THOMAS L. DUNIGAN
Deputy Attorney General
State of New Mexico
P.O. Drawer 1508
Sante Fe, N.M. 87501
(505) 982-6000

DENISE FORT
Assistant Attorney General

PAUL L. BLOOM
Special Assistant Attorney General

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

		PAGE
INTEREST OF AMICUS AND SUMMARY OF ARGUMENT		1
Point I.	The State's Power To Tax	2
Point II.	Judicial Scrutiny Under The Commerce Clause	3
Point III.	An Indian Tribe Does Not Possess The Authority To Impose A Severance Tax Upon A Federally And Tribally Approved Lessee ..	5
CONCLUSION		9

TABLE OF AUTHORITIES

CASES:	PAGE
Amoco Production v. *Jicarilla Apache Tribe, et al.*, No. 80-15	2
Buster v. *Wright*, 135 Fed. 947 (8th Cir. 1905)	7
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831)	6
Exxon Corp. v. *Wisconsin Department of Revenue*, _____ U.S. _____, 100 S.Ct. 2109 (1980)	4
Gibbons v. *Ogden*, 22 U.S. (9 Wheat) 1 (1824)	2
Iron Crow v. *Ogalala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956)	7
Lane County v. *Oregon*, 74 U.S. (7 Wallace) 71 (1868)	2, 3
Massachussets v. *United States*, 435 U.S. 444 (1978)	4
Maxey v. *Wright*, 154 S.W. 807 (Ct. App. Ind. Ten. 1900) aff'd, 105 Fed. 1003 (8th Cir. 1900)	7
Merrion et al. v. *Jicarilla Apache Tribe, et al.*, No. 80-11	2
McClanahan v. *Arizona Tax Commission*, 411 U.S. 164 (1973)	6
Oklahoma Tax Commission v. *Texas Co.*, 336 U.S. 342 (1949)	3
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	6
Railroad Co. v. *Peniston*, 85 U.S. (18 Wallace) 5 (1873)	2
U.S. v. *Kagama*, 118 U.S. 375 (1886)	6
U.S. v. *Wheeler*, 435 U.S. 313 (1978)	6
Ward v. *Maryland*, 79 U.S. (12 Wallace) 418 (1970)	3
Washington v. *Confederated Tribes of the Colville Indian Reservation*, _____ U.S. _____, 100 S.Ct. 2069 (1980)	7, 8
Williams v. *Lee*, 358 U.S. 217 (1959)	6

Table of Authorities Continued

CONSTITUTION, TREATIES AND STATUTES: PAGE

U.S. Const , Interstate Commerce Clause, art.1, §8, cl.3 3

OTHER AUTHORITIES:

Church, Conflicting Federal, State and Local Interest Trends in State and Local Energy Taxation, 31 Nat'l Tax J.269 (1978) 3

Hallerstein, Constitutional Constrants on State and Local Taxation of Energy Resources, 31 Nat'l Tax J.245 (1978) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-581

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTERMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY, *Appellants,*

v.

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER, *Appellees.*

On Appeal From The Supreme Court Of The State Of Montana

BRIEF *AMICUS CURIAE* OF THE STATE OF NEW MEXICO

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT.

This brief is filed on behalf of the State of New Mexico by the Attorney General of the State of New Mexico in support of the appellees.

The State of New Mexico levies a severance tax on the production of coal, much of which ultimately enters interstate commerce. New Mexico is concerned that a finding that any specified level of severence tax constitutes an impermissible burden on interstate

commerce will impair New Mexico's ability to determine on behalf of its citizens the proper level of taxation reflecting costs of present and future services, and other impacts and factors related to mineral development. New Mexico further believes that this question is essentially one of legislative policy, within the exclusive purview of the state and national legislatures. We also believe it is important, in view of the Court's order setting down this case with the *Jicarilla* cases, *Merrion et al.* v. *Jicarilla Apache Tribe,* et al, No. 80-11 and *Amoco Production* v. *Jicarilla Apache Tribe,* et al, No. 80-15, in which New Mexico is also *amicus curiae,* to point out the difference between a State's undisputed power to enforce a severance tax and an Indian Tribe's invalid attempt to apply a severance tax to a non-Indian lessee operating under a tribally and federally approved lease. In the latter case, we believe that the nature of the tribe's limited sovereignty over non-Indians, and the federal and tribal approval of a mineral lease, deprive a tribe of the right to impose such a tax.

I. The State's Power To Tax

The nature and extent of a state's power to tax are central to this case, as the nature and extent of an Indian tribe's power to tax are central to the *Jicarilla* cases with which this case has been calendared. The taxing power has been identified as "indispensable" to the very nature and existence of the states. *Railroad Co,* v. *Peniston*, 85 U.S. (18 Wallace) 5 (1873); *Lane County* v. *Oregon,* 74 U.S. (7 Wallace) 71 (1868); *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat) 1 (1824). The origin of that power is not to be found in a specific statutory provision, nor even in the United States Constitution. Rather, it is one of a state's "attributes of sovereignty" which "exists independently of the Constitution of the United States, and underived from that instrument. . . ." *Railroad Co.* v. *Peniston*, 85 U.S. (18

Wallace) 5 (1873); accord, *Ward* v. *Maryland,* 79 U.S. (12 Wallace) 418 (1870). In *Lane County* v. *Oregon,* 74 U.S. (17 Wallace) 71 (1868), the Court explained the historical origin of the states' taxing power: the colonies exercised this function; under the Articles of Confederation the power continued to be exercised without any encumbrances, other than a limitation of non-interference with Congressional treaties; and the Constitution, while creating a power of taxation in the national government, left entire the states' taxing power. Thus, the power of the states to tax "is coextensive with the subjects within their unrestricted sovereign power. . . ." *Ward* v. *Maryland,* supra, at 428. Moreover, there is no different rule for state taxation of mineral lesses of exempt lands. See, *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342 (1949).

II. Judicial Scrutiny Under The Commerce Clause

The limits imposed on a state's taxation of those who exploit its resources are of the greatest concern to New Mexico. Principal among the conflicts engendered by this case is the question whether the Commerce Clause of the Constitution mandates or even permits judicial review of the level of a state's tax. The argument advanced by appellants that state taxes must be scrutinized to determine if their rate or level is appropriate, cannot be limited to any particular level of taxation[1] or to any particular form of taxation.[2] This

[1] The denomination of a tax rate as 30 percent is in itself unilluminating, not only because one must know such factors as the base to which the tax applies, but also because it is difficult to compare the value to which the rate is applied. For example, in respect to coal, anticipated transportation costs will so affect the price received for the mineral that a comparison of percentage rates is unhelpful. See, Church, Conflicting Federal, State and Local Interest Trends in State and Local Energy Taxation; Coal and Copper — A Case in Point, 31 Nat'l Tax J. 269, 272 (1978).

[2] The appellants have attempted to simplify the issue by limiting

scrutiny, if permitted, would represent a fundamental and unwarranted displacement of a state's ability to determine finally its own taxation policies.

The language in recent cases that a tax must be "fairly related to the services provided by the State," *Exxon Corp.* v. *Wisconsin Department of Revenue*, _____ U.S. _____, 100 S.Ct. 2109 (1980), is interpreted by the appellants to permit judicial review of the proper level of taxation. The institutional considerations which militate against judicial assumption of the role urged upon it by appellants are obvious and numerous.[3] The review sought by appellants raises the prospect that courts will be obliged to receive and weigh complex and ambiguous bodies of "evidence" on the question whether a "fair relationship" is present between the "costs" occasioned by industrial activity and the taxes imposed by a state.[4] In response to these

---

their attack to one particular type of tax — a severance tax. There would appear to be no conceptual reason why their attack could not include the total tax burden a state might impose on their industry, by other excise taxes, property taxes or corporate income taxes. See, Brief for Appellants at 10. Indeed, an energy corporation might contend that all costs imposed on it by the state, including worker protection and environmental costs, must be included in determining the burden a state imposes on their commerce. See, *id.*

[3] See, Hellerstein, Constitutional Constraints on State and Local Taxation of Energy Resources, 31 Nat'l Tax J. 245, 251 (1978).

[4] There is no agreement on the standards to be applied in this inquiry. First, while the appellants assume that a "fair relationship" requires that taxes be used to cover the immediate costs imposed by their industry, the permissible purpose of taxation has not been so rigidly limited by decisions of this Court. See, *Massachussetts* v. *United States*, 435 U.S. 444 (1978). Second, even if the states were limited to recouping immediate costs, or some similar purpose, there is unlikely to be agreement over what costs are properly compensated, i.e., how are permanent esthetic and scenic injuries or degradation of air or stream quality valued?

considerations, the appellants maintain that the legislative processes are ineffective to protect their interests and that this factor warrants special judicial protection.[5]

The appellants' picture of total exclusion from Montana's political processes is unpersuasive. It should be noted that the appellants themselves claim that Montana's tax policies have[6] or will[7] adversely affect the state's production of coal. The citizens of Montana presumably have an interest in coal production for the benefits of employment and tax revenues it brings them, and will share the appellants' interest at least to that degree. Further, the presence of some of these corporations within the state suggests that they do not lack political impact through the avenues traditionally available to businesses. Also, the state legislature of Montana is not the sole political body with authority over these issues. Congress has also considered legislation addressed to this very issue (see, S. 2695, H.R. 7725, H.R. 7163, 96th Cong., 2d Sess. (1980)) and the competing policy arguments have been presented to it.

III. An Indian Tribe Does Not Possess The Authority To Impose A Severance Tax Upon A Federally And Tribally Approved Lessee.

In distinction to the undisputed power of a state to impose a severance tax on mineral production within its borders, an Indian tribe enjoys no such power in respect to a non-Indian lessee possessing a tribally and federally approved lease.

---

[5] Brief for Appellants at 27, 31.

[6] Brief for Appellants at 38.

[7] The appellants' argument at Point III of their brief that Montana's policies frustrate the federal policy to encourage coal use, presupposes a resulting decline in production.

A tribe is a "domestic dependent nation". *Cherokee Nation* v. *Georgia* 30 U.S. (5 Pet.) 1 (1831). In *U.S.* v. *Kagama,* 118 U.S. 375 (1886), this Court declared that Indian tribes were "dependent for their political rights" on the federal government. The Court has subsequently clarified the right of tribes to "make their own laws and be ruled by them". *Williams* v. *Lee,* 358 U.S. 217 (1959). This power of tribal self-government has been construed as broadly controlling internal relations of the tribe, even to the extent of excluding jurisdiction of state laws where their enforcement would infringe upon a tribe's right to govern itself. *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973). However, it has been sharply limited in respect to non-Indians, who cannot enjoy membership in the tribe and have no access to its political or cultural institutions. The inability of an Indian tribe to apply its laws to a non-Indian non-member has long been noted. In *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), the Court struck down an attempt by a tribe to apply its criminal laws to a non-Indian; in doing so it noted that Congress had indicated its belief that Indian tribal law is enforceable only against Indians, not against non-Indians. In that case, the Court described the diminished sovereignty of a Tribe as lacking those powers "inconsistent with their [dependent] status." 435 U.S. at 208.

A similar statement of this interpretation of the limits on a tribe's authority to enforce its laws against non-Indians is laid down in *U.S.* v. *Wheeler,* 435 U.S. 313, (1978), where relations between an Indian tribe and non-members of the tribe are held to fall within an area of "implied divestiture of sovereignty. . . ."

In a situation where a non-Indian possesses a federally-approved lease to enter and do business on tribal lands, the tribe has no governmental power to impose a tax on the lessee. The cases recognizing a limited right in tribes to tax non-Indians do not establish the right to tax such a lessee, as these cases derive from a tribe's unquestioned right as a proprietor of land to exclude non-Indians or non-members from entering on tribal lands, or to regulate the terms of their access to tribal lands. *Maxey* v. *Wright,* 154 S.W. 807 (Ct. App. Ind. Ten. 1900), aff'd, 105 Fed. 1003 (8th Cir. 1900); *Iron Crow* v. *Ogalala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956); *Buster* v. *Wright,* 135 Fed. 947 (8th Cir. 1905). This Court's recent decision in *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* _____ U.S. _____, 100 S.Ct. 2069 (1980) recognizes but does not enlarge this tribal power to tax non-Indians to regulate and control non-Indian entry upon tribal lands for business purposes, as in the case of business invitees who entered tribal lands to buy cigarettes. These cases have no logical or legal bearing, however, on a situation where a tribe, and its guardian the U.S. Secretary of the Interior, have acted extensively and finally to regulate and define consideration for use of tribal lands and resources. After a tribe has negotiated for, and obtained, and its guardian has approved, terms of a lease providing rents and royalties to a tribe, it cannot be rationally contended that a tribe must be free to exercise a "right" to tax non-Indians in order to limit or regulate access to its territory or resources. To allow a Tribe to tax a captive lessee, i.e. one that cannot pick up its mineral interests and remove with them from the reservation, is to allow it to rewrite the terms of entry by imposing a potentially prohibitive or non-competitive level of taxation. It would create a profoundly uncertain

environment for non-Indian investment in the development of tribal resources, by sending a message to non-Indians that, even after negotiating leasehold terms satisfactory to a tribe, the investor remained subject to unpredictable tribal tax ordinances. These could radically change the economics of the lessee's operation and there would be no effective political recourse for a lessee which cannot, as a non-Indian, participate in the governmental processes of the tribe. It is very hard to see how a tribe's "right" to override its own negotiation and execution of a lease and impose costly new burdens on a non-Indian lessee constitutes a legitimate and necessary part of a tribe's "right to make its own laws and be ruled by them". It is much more similar to certain tribes' recent attempts to market a claimed exemption from state taxation as in the situation addressed by the Court in *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* supra. In that case, the Court clearly held that Indian tribes were never intended to be able to create competitive advantages for sales to non-Indians on tribal lands by asserting that "Tribal self-government" excluded state taxation of the transactions. The claimed right of a tribe to impose a tax upon a non-Indian lawfully holding a federally and tribally approved lease is closely analogous to the claimed right to market enclaves of freedom from state taxes and laws. Both are equally invalid attempts to stretch legitimate attributes of tribal authority into inequitable economic gains at the expense of a tribe's non-Indian neighbors.

CONCLUSION

For these reasons, we respectfully urge the Court to affirm the decision of the Supreme Court of Montana.

JEFF BINGAMAN
Attorney General

THOMAS L. DUNIGAN
Deputy Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, N.M. 87501
(505) 982-6000

DENISE FORT
Assistant Attorney General

PAUL L. BLOOM
Special Assistant Attorney General

No. 80-581

In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

— against —

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF NORTH DAKOTA AND WEST VIRGINIA IN SUPPORT OF APPELLEES

ROBERT O. WEFALD
Attorney General of
North Dakota

LEO F. J. WILKING
Assistant Attorney General

State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

CHAUNCEY H. BROWNING, JR.
Attorney General of
West Virginia

State Capitol Building
Charleston, West Virginia 25305
(304) 348-2021

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

	Page
Interest of the Amici Curiae	1
Summary of Argument	4
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Pages

CASES:

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 5

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 8

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 8

Hill v. Florida, 325 U.S. 538 (1945) 7

Hines v. Davidowitz, 312 U.S. 52 (1941) 5, 6

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 6

Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1943) 5

Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) 7

Perez v. Campbell, 402 U.S. 637 (1971) 6

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 7

State of Wisconsin v. J. C. Penney, 311 U.S. 435 (1940) 9

STATUTES:

Section 57-61-01, North Dakota Century Code, as amended 3

Sections 11-13-2a, 11-13-2l of the West Virginia Code of 1931, as amended 3

No. 80-581

In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY ET AL.,

Appellants,

— against —

STATE OF MONTANA ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF NORTH DAKOTA AND WEST VIRGINIA IN SUPPORT OF APPELLEES

INTEREST OF THE AMICI CURIAE

North Dakota, like its neighboring state of Montana, is the respository of vast deposits of a precious natural resource: coal. As the nation's energy crisis has grown more and more acute and the demand for alternatives to expensive foreign oil increasingly insistent, America has looked to the coal-producing states of the West and the Northern Great Plains to help alleviate a serious national problem.

North Dakota has responded to the crisis, with coal production in the state more than doubling between 1973 and 1980—from 6.8 million to 16.2 million tons of coal. The great bulk of coal mined in North Dakota, as in Montana, is used to satisfy the demands of energy consumers in distant states. When all electric generating plant projects now approved are in operation, about 80 percent of the electricity generated from coal produced in North Dakota will be exported out of state.

But such a dramatic increase in coal development does not take place without a profound impact on the land and the people on it. First, there are the ordinary costs associated with any kind of accelerated, large-scale industrial development. The sudden influx of workers and their families means that communities in coal impact areas face new and expensive demands for increased fire and police protection, additional classroom space and expanded teaching staffs, new streets and highways, improved water and sewage systems, parks and recreation areas, and a whole host of social services.

Secondly, there are the environmental risks entailed in such development. The burning of coal by electric generating plants in North Dakota results in the release of tons of sulfur dioxide into the air despite state and national air quality standards. Such plants also require a tremendous volume of water, a resource even more precious than coal in Western and Midwestern States. Water is essential to the farming and ranching activities which constitute the economic and social underpinning of both North Dakota and Montana.

Finally, coal development results in the loss of a nonrenewable resource. Unlike the crops of wheat and sun-

flowers which stretch across the North Dakota landscape every year, coal is a "one-time harvest." Once mined and burned, it can never again serve as an economic or energy resource for the people of North Dakota. This fact imposes a special responsibility on those who oversee the development of this resource and plan for future generations of North Dakotans.

With these and other considerations taken into account, North Dakota has imposed a severance tax on coal which is currently set at 96 cents per ton.[1] Fully 70 percent of the revenues generated by this tax are distributed among cities, counties, and school districts impacted by coal development. Although its rate of severance tax is lower than that of Montana, North Dakota has a vital interest in preserving the right of states to levy whatever taxes they deem necessary and proper on their own natural resources. If appellants are successful, no state will be immune to special interest challenges to its sovereign right to collect such taxes.

The State of West Virginia joins North Dakota as *amicus curiae* because it also is a significant producer of coal. In 1980, coal production in West Virginia totaled more than 110 million tons. West Virginia imposes severance taxes on coal which total 3.85 percent of gross sales.[2]

---

1 Section 57-61-01, North Dakota Century Code, as amended. The coal severance tax in North Dakota is revised twice annually to reflect any increase in the wholesale price index as prepared by the U. S. Department of Labor.

2 Sections 11-13-2a, 11-13-2l of the West Virginia Code of 1931, as amended.

Thus West Virginia has a substantial interest in safeguarding the right of states to determine the nature and amount of taxes imposed on the development of natural resources within their borders.

SUMMARY OF ARGUMENT

No power is more precious or necessary to a state than its power to tax. Appellants seek to limit Montana's authority to levy a coal severance tax on the basis of its alleged conflict with a vague and ill-defined national policy favoring the use of coal. They fail to cite any specific Congressional enactment which purports to restrict state taxing powers in this area, nor even any general directive to that effect. Absent a clearly discernible federal policy limiting state severance taxes, the Montana coal severance tax is not invalid under the Supremacy Clause of the Constitution.[3]

ARGUMENT

The power of taxation is the most fundamental prerogative exercised by the states in our federal system. It is a power which cannot be abrogated except by specific

3 This *amici curiae* brief deals only with arguments raised under the Supremacy Clause. *Amici* rely upon the briefs filed by appellees and the State of Wyoming for treatment of the Commerce Clause issue.

mandate of the Constitution or by a particular act of Congress. This principle has gained repeated endorsement in the decisions of this Court. Thus, in *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 93 (1940), the Court stated:

> "In the states there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the states over taxation is plenary."

Similar strong language in support of a state's broad authority to tax is found in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959):

> "When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests."

It is important to keep this traditional judicial deference to state taxing power in mind when considering the cases principally relied on by appellants in their argument that the Montana coal severance tax must fall by virtue of the Supremacy Clause. None of those cases involved preemption of a state tax statute.

In fact, in the seminal case of *Hines v. Davidowitz*, 312 U.S. 52 (1941), which provides the basis for the third test of preemption so frequently cited by appellants—a state statute will be found unconstitutional if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—this Court emphasized the special status of state tax laws. In striking down a Pennsylvania statute which provided for more intrusive

regulation of aliens than required by federal law, the Court noted that the state legislation was in a field affecting international relations, traditionally reserved to the national government. It then took pains to distinguish that situation from one involving state taxing power (page 68):

> "Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."

An equally important aspect of *Hines* and the other cases offered by appellants is the fact that all involved preemption of a state statute because of conflict between it and very specific federal enactments occupying the same field. Thus, in *Hines,* an Alien Registration Act adopted by Pennsylvania which required aliens to carry identification cards was in clear conflict with the federal Alien Registration Act of 1940, which had no such requirement.

Similarly, in *Perez v. Campbell,* 402 U.S. 637, at 644 and 648 (1971), Arizona's Motor Vehicle Safety Responsibility Act, protecting judgment creditors from "financially irresponsible persons," clashed directly with provisions of the federal Bankruptcy Act, intended to give discharged debtors a new start "unhampered by the pressure and discouragement of preexisting debt."

In *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977), California's laws governing the weight of packages and containers were superseded by detailed provisions of the Federal Meat Inspection Act, the Federal Food, Drug and

Cosmetic Act, and the Fair Packaging and Labeling Act. In *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978), legislation in the state of Washington relating to the size of tankers and the necessity of having pilots on board coastwise vessels was in direct conflict with the federal Ports and Waterways Safety Act of 1972.

Finally, in both *Hill v. Florida,* 325 U.S. 538 (1945), and *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), this Court found that Florida had made an unwarranted excursion into the field of labor relations and was thus at odds with the comprehensive National Labor Relations Act.

In contrast to the cases described above, there is no evidence in the instant case of a specific federal statute with which the Montana coal severance tax is in direct conflict. Instead, appellants refer to actions by Congress which appear to establish a national policy in favor of increased production and use of coal. (Appellants, and the State of Texas in its brief *amicus curiae,* also point to a series of Presidential energy messages in the same vein; however, since Presidential messages do not rise to the level of Congressional enactments, they are irrelevant to a discussion of the Supremacy Clause).

However, appellants do not refer to any part of this general policy which dictates that coal must be cheap, or that Montana is the only acceptable source of coal, or that states which happen to have abundant coal supplies must disregard the social and environmental costs and the financial impact of increased coal production. Nor do they make any showing that Congress has concerned itself with the effect of coal severance taxes on coal production.

In short, appellants would have this Court rule that a broad national policy only vaguely defined by Congress should serve to perempt specific state legislation to which Congress has never addressed itself. Such an interpretation of the Supremacy Clause would be a dramatic departure from the Court's prior rulings in this area. Simply stated, "[t]his Court is generally reluctant to infer preemption . . ." *Exxon Corp. v. Governor of Maryland,* 437 U. S. 117 (1978). As the Court said in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 143 (1963):

> "[F]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

Appellants are unable to cite any federal legislation in which Congress has "unmistakably . . .ordained" that Montana's 30 percent coal severance tax must be reduced or declared invalid.

This case has very broad implications for the future of state taxing power. If appellants succeed in nullifying the Montana coal severance tax, a host of other state severance taxes will be called into question. Texas, whose severance tax revenues are almost twenty times those of Montana, could well be the target of a similar challenge based on the impact of its taxes on oil and gas prices. Nor would severance taxes be the only category of taxes affected. Almost any localized tax with an impact beyond state borders could be in jeopardy if it was found to conflict with "national policy."

In addition, a favorable ruling for appellants would soon lead to the entanglement of state and federal courts across the country in a process for which they are ill-suited

and ill-prepared: the setting of appropriate state taxing rates. It would be grossly inappropriate for courts to substitute their judgment for the duly considered actions of state legislatures. As this Court observed in *State of Wisconsin v. J. C. Penney*, 311 U. S. 435, 445 (1940):

> "At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves into the delicate processes of fiscal policy-making."

If Congress sees fit to restrict the power of the states to levy taxes on coal or any other natural resource, Congress will do so in explicit terms. As appellees have pointed out, the 96th Congress considered but did not approve legislation imposing a ceiling of 12½ percent on coal severance taxes. Such legislation has already been introduced in the current session of Congress. It is not the function of this Court to anticipate the will of Congress.

CONCLUSION

For the reasons set forth above and in the briefs submitted by appellees and other *amici curiae* in their behalf, the appeal should be dismissed, or, in the alternative, the judgment entered by the Supreme Court of the State of Montana should be affirmed.

Respectfully submitted,

Robert O. Wefald
Attorney General of North Dakota
Leo F. J. Wilking
Assistant Attorney General
Chauncey H. Browning, Jr.
Attorney General of West Virginia

Dated: February 19, 1981

NO. 80-581

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

* * *

COMMONWEALTH EDISON COMPANY, et al.,
Appellants,

v.

STATE OF MONTANA, et al.,
Appellees.

* * *

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF
MONTANA

* * *

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS

* * *

MARK WHITE
Attorney General of Texas
Counsel of Record

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY III
Executive Assistant

JAMES R. MEYERS
Assistant Attorney General

JUSTIN ANDREW KEVER
Assistant Attorney General

JOHN STUART FRYER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512)479-8191

ATTORNEYS FOR THE
STATE OF TEXAS
Of Counsel:
DONALD A. GARRITY
Garrity, Keegan & Brown
1400 Eleventh Avenue
Helena, Montana 59601
(406)442-8711

Dated: January 19, 1981

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF TEXAS 1

SUMMARY OF ARGUMENT 4

THE OBJECTIVES OF CONGRESS 4

PREEMPTION 12

FRUSTRATION OF THE NATIONAL PURPOSE 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page**

Hines v. Davidowitz, 312 U.S. 151 (1978) 12

Malone v. White Motor Corp., 435 U. S. 497 (1978) 13

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 17

Perez v. Campbell,412 U.S. 637 (1971) 13

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 12,13

Southwestern Oil Co. V. Texas, 217 U.S. 114 (1910) 3

Statutes

Clean Air Act Amendments of 1977 16

Emergency Petroleum Allocation Act of 1973 (Pub.L. 93-511, 88 Stat. 1608) 4

Energy Policy and Conservation Act of 1976 (Pub.L. 94-163, 89 Stat. 871) 4

Energy Supply and Environmental Coordination Act of 1974 (Pub.L. 93-319, 88 Stat. 246) 4

Natural Gas Policy Act of 1978 4,16

Powerplant and Industrial Fuel Use Act, (Pub.L. 95-620, 92 Stat. 3289 (1978) 10,11,12

Other Authorities

Analysis of Proposed U. S. Department of Energy Regulations Implementing the Powerplant and Industrial Fuel Use Act, Department of Energy (November 1978) 2

1 EN. MNGM'T (CCH)

Para. 549 7
Para. 550 7
Para. 606 8
Para. 657 7,8
Para. 691 8
Para. 693 8
Para. 711 9
Para. 739 9

TABLE OF AUTHORITIES (CONT'D)

Page

H.R. REP. NO. 95-496, 95th CONG., 2d Sess. 3 (1978) 14

Presidential Energy Address (April 18, 1977)
reported in 1 EN. MNGM'T (CCH) Para. 731 5

President Nixon's Energy Message to Congress,
9 WEEKLY COM. OF PRES. DOC. 389-406 (April 23, 1973) 5,6

S. REP. NO. 95-361, 95th CONG.,2d Sess. 37,
reprinted in 1978 U.S. CODE CONG. & AD NEWS 8361 ... 15

NO. 80-581

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

COMMONWEALTH EDISON COMPANY, et al.,

Appellants,

v.

STATE OF MONTANA, et al.,

Appellees.

* * *

ON APPEAL FROM THE

SUPREME COURT OF THE STATE OF MONTANA

* * *

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS

* * *

THE INTEREST OF TEXAS

The interest of the State of Texas in the Montana coal severance tax can be expressed in several contexts. First, utilities serving Texas consumers are committed to purchase Montana coal. The City of Austin, for example, will be burning large amounts of the coal in its electric generating facilities. The Fayette I facility, to be operated by Austin and the Lower Colorado River Authority, will purchase fifty million tons of Montana

coal during the twenty-five year term of its contract with Decker Coal Company. Houston Lighting & Power will purchase 176 million tons of Montana coal for use in its own facilities. The interests of the state and its citizens, as consumers and ratepayers of electricity produced from the combustion of that coal, are greatly affected by the tax and consequent cost of the coal.[1] Texas' concern in this regard is not limited to disfavoring a net transfer of wealth from its citizens to the Montana treasury. We are concerned that the artificial added cost of energy imposed by the tax will either prevent new industries from developing in Texas or encourage existing industry to leave the state in order to find cheaper energy elsewhere.

Second, Texas fears that if the Montana tax is allowed to stand, other coal producing states will raise their tax structures to the Montana level. Such a result would subject most of the coal consumed in Texas to the tax Consumers would have few alternatives. They could look abroad for competing sources of coal, or they could suffer the consequences of decreased energy production.

[1] Because of Texas' long reliance on its natural gas and petroleum, and because it lacks substantial deposits of high-quality coal, the shift to increased coal use will be far more difficult and costly for Texas than for other areas of the country. Based upon a United States Department of Energy Study, "Analysis of Proposed U. S. Department of Energy Regulations Implementing the Powerplant and Industrial Fuel Use Act" (November 1978), approximately one-half of national conversion costs associated with the Powerplant and Industrial Fuel Use Ace will be borne in Texas. Texas concerns involve, in part, exacerbation of those conversion costs by the additional tax burden exacted.

Third, the high level of the Montana tax could spur other states to tax their own resources accordingly. Some states would be encouraged to discover new sources of tax revenues from goods sold upon the national economy. Other states may simply tax old sources at new rates. As a sovereign state exacting severance taxes of its own,[2] Texas does not dispute the right of states to levy severance taxes and other measures long held to be valid -- and necessary -- acts of sovereignty. As this Court has noted, so long as states do not abridge the Constitution they possess a wide latitude of discretion to impose taxes to support the general welfare of the state. *See Southwestern Oil Company v. Texas*, 217 U.S. 114 (1910).

Although Texas supports the rights of states to levy appropriate tax measures, and does not oppose Montana's right to impose a coal severance tax *per se*,[3] we believe that the particular tax subject to this Court's review is inconsistent with our system of federalism. If Texas were autonomous, it would use its own energy resources for domestic purposes and export the

[2] Texas collects a severance tax of 4.6% of value of oil produced and 7.5% of value of natural gas produced within the state.

[3] Texas defends the rights of states to enact appropriate taxes upon the activity of severing minerals from the state. Mineral extraction imposes many economic, environmental and social costs upon a state while requiring the state to provide additional services. A severance tax is a means of imposing those costs upon those benefiting from the activity. Texas wishes to make clear that it is not the concept of a coal severance tax which is being challenged, but the excessive *rate* of this particular tax.

remainder at the price level of the world market.[4] Texas would not need Montana coal. As shown below, however, a federal program prevents Texas from acting as its own interests otherwise would dictate. Texas does need Montana coal. The Constitution prevents any state from inordinately benefiting from such a federal response to a national problem; the Montana tax should be declared invalid.

SUMMARY OF ARGUMENT

The Congress has enacted a national energy policy designed to substitute the use of coal and other more abundant resources for the use of increasingly scarce oil and natural gas. The Montana coal severance tax stands as a substantial obstacle to the attainment of the national objective. By frustrating the statutes of Congress, the Montana tax is preempted and should be declared invalid.

THE OBJECTIVES OF CONGRESS

No single issue has received more public attention in the past few years than our nation's energy problem. This critical subject repeatedly has been singled out by the last three Presidents as crucial to our nation's future. As stated by President Carter in his April 18, 1977, Presidential Energy Address:

[4] As presented in our brief supporting the jurisdictional statement of appellants, a variety of federal statutes control the price, production, and allocation of oil and natural gas produced in Texas. *See* e.g., the Emergency Petroleum Allocation Act of 1973 (Pub.L. 93-511, 88 Stat. 1608); the Energy Supply and Environmental Coordination Act of 1974 (Pub.L. 93-319, 88 Stat. 246); the Energy Policy and Conservation Act of 1976 (Pub.L. 94-163, 89 Stat. 871). Natural Gas Policy Act of 1978, Pub.L. 95-621 (1978).

> Tonight I want to have an unpleasant talk with you about a problem that is unprecedented in our history. With the exception of preventing war, this is the greatest challenge that our country will face during our lifetime. The energy crisis has not yet overwhelmed us, but it will if we do not act quickly.

Presidential Energy Address (April 18, 1977), reported in 1 EN. MNGM'T (CCH) Para. 731.

We realize that we must decrease our dependency on and use of foreign oil. Our response is, and has been, to substitute wherever possible alternate energy sources. The most practical alternative is coal.

The past three Presidents have called for greatly expanded use of coal. In 1973 President Nixon addressed the subject in a special message to Congress.

> *Coal*
>
> Coal is our most abundant and least costly domestic source of energy. Nevertheless, at a time when energy shortages loom on the horizon, coal provides less than 20 percent of our energy demands, and there is serious danger that its use will be reduced even further. If this reduction occurs, we would have to increase our oil imports rapidly, with all the trade and security problems this would entail.
>
> *I urge that highest national priority be given to expanded development and utilization of our coal resources.* Present and potential users who are able to choose among energy sources should consider the national interest as they make their choice. Each decision against coal increases petroleum or gas consumption, compromising our national self-sufficiency and raising the cost of meeting our energy needs....
>
> As an additional measure to increase the production and use of coal, I am directing that a

> new reporting system on national coal production be instituted within the Department of the Interior, and I am asking the Federal Power Commission for regular reports on the use of coal by utilities. (Emphasis added.)

President Nixon's Energy Message to Congress, 9 WEEKLY COMP. OF PRES. DOC. 389-406 (April 23, 1973).

Little more than six months after Mr. Nixon's message, the nation was in an energy crisis. The President focused on the critical situation in an address to the nation, making the following remarks:

> I want to talk to you tonight (November 7, 1973) about a serious energy problem we must all face together in the months and years ahead.
>
> As America has grown and prospered in recent years, our energy demands have begun to exceed available supplies. In recent months we have taken many actions to increase supplies and reduce consumption. But even with our best efforts, we knew that a period of temporary shortages was inevitable. . . .
>
> We must therefore face up to the stark fact that we are heading toward the most acute shortages of energy since World War II. Our supply of petroleum this winter will be at least 10 percent short of our anticipated demands -- and could fall short by as much as 17 percent.
>
> Even before war broke out in the Middle East, these prospective shortages were the subject of intensive discussions among members of my Administration and leaders of Congress, Governors, mayors, consumers and industrial representatives. From these discussions has emerged a broad agreement that we must now set out upon a new course for our Nation.

> In the short run, this course means that we must use less energy -- less heat, less electricity, and less gasoline. In the long run, it means that we must develop new sources of energy which give us the capacity to meet our needs without relying upon foreign nations. . . .
>
> We must be sure that our most vital needs are met first -- and that our least important activities are the first to be cut back. And we must be sure that while the fat from our economy is being trimmed, the muscle is not seriously damaged.
>
> Immediate steps. -- *First, I am directing that industries and utilities which use coal -- our most abundant resource -- be prevented from converting to oil in the immediate future. Efforts will also be made to convert power plants from the use of oil to the use of coal.* (Emphasis added.)

Text of an address by the President on the energy crisis, as reported in 1 EN. MNGM'T (CCH) Paras.549, 550.

The Arab oil embargo thus propelled coal to a position of paramount importance in the federal scheme of energy independence. Coal was to become even more important in the coming years.

Within eleven months, a new Administration proposed a policy to require use of coal and nuclear energy for new electric generating facilities and for the conversion of existing plants. White House Fact Sheet, "A Program to Control Inflation in a Healthy and Growing Economy," October 8, 1974, as reported in 1 EN. MNGM'T (CCH) Para 657. Several months later, President Ford's first State of the Union address demonstrated that adjustments would be necessary -- and coming -- to facilitate the increased use of coal:

> Use of our most abundant domestic resource --coal-- is severely limited. We must strike a reasonalbe compromise on environmental concerns with coal. I am submitting Clean Air

> Act amendment which will allow greater coal use without sacrificing our clean air goals . . . .
>
> I vetoed the strip mining legislation passed by the last Congress. With appropriate changes, I will sign a revised version into law.

1 EN. MNGM'T (CCH) Para. 691.

Additionally, in a White House Fact Sheet accompanying the address, the Administration stated:

> Actions to achieve the above national energy goals must be based upon the following principles:
>
> --Provide energy to the American consumer at the lowest possible cost consistent with our need for secure energy supplies.
>
> --Make energy decisions consistent with our overall economic goals.
>
> --Balance environmental goals with energy requirements.
>
> --Rely upon the private sector and market forces as the most efficient means of achieving the Nation's goals, but act through the government where the private sector is unable to achieve our goals.
>
> --Seek equity among all our citizens in sharing of benefits and costs of our energy program.
>
> --Coordinate our energy policies with those of other consuming nations to promote interdependence, as well as independence.

Id., Para. 693, White House Fact Sheet on the President's State of the Union Message, January 15, 1975.

In his second State of the Nation speech, the President reaffirmed the need for a strong coal policy to discourage the use of oil and natural gas. *Id*, Para. 606.

Finally, President Carter continued the chain of presidential proclamations urging increased use of coal to reduce our dependence on imported oil.

> Some believe that we should not continue or expand the use of coal and others have the same view about nucleur energy. But a careful look indicates that we do not have a *choice* between increasing the use of coal or nuclear energy. Instead, we must increase the use of *both* coal and nuclear energy until more acceptable alternate energy sources are available. Even with strong efforts to conserve energy, and increased efforts to produce domestic oil and natural gas, we must increase the use of both coal and nuclear energy if we are to meet the demands for energy for a growing economy. The only alternative is to increase our growing dependence on imported oil.

Id., Para. 711, Presidential Energy Message to Congress, January 7, 1977.

Additionally, to encourage further utilization of coal the President proposed a tax on the use of oil and natural gas in industrial facilities. "Although coal now provides only 18 percent of our total energy needs, it makes up 90 percent of our energy resources. . . . To increase the use of coal by 400 million tons or about 65 percent. . . I propose a sliding scale tax. . . on large industrial users of oil and natural gas." *Id.*, Para. 739, President Carter's Energy Message to Congress, April 20, 1977.

Against this background of presidential pronouncements, Congress has expressed a strong purpose to further the immediate and long term interests of the nation by the establishment of a federal scheme designed to increase the use of coal in lieu of

alternative energy sources. That purpose is most centrally expressed in Section 102 of the Fuel Use Act.[2]

> (a) Findings.--The Congress finds that--
>
> (1) the protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expanded use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuelburning installations; and
>
> (2) the purposes of this Act are furthered in cases in which coal or other alternate fuels are used by electric powerplants and major fuel-burning installations, consistent with applicable environmental requirements, as primary energy sources in lieu of natural gas or petroleum.
>
> (b) Statement of Purposes.--The purpose of this Act, which shall be carried out in a manner consistent with applicable environmental requirements, are--
>
> (1) to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources of the United States to the extent such reduction and use further the goal of national energy self-sufficiency and otherwise are in the best interests of the United States;
>
> (2) to conserve natural gas and petroleum for uses, other than electric utility or other industrial or commercial generation of steam or

[5] Powerplant and Industrial Fuel Use Act, Pub.L. 95-620, 92 Stat. 3289 (1978).

electricity, for which there are no feasible alternative fuels or raw material substitutes;

(3) to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source;

(4) to the extent permitted by this Act, to encourage the use of synthetic gas derived from coal or other alternate fuels;

(5) to encourage the rehabilitation and upgrading of railroad service and equipment necessary to transport coal to regions or States which can use coal in greater quantities;

(6) to prohibit or, as appropriate, minimize the use of natural gas and petroleum as a primary energy source and to conserve such gas and petroleum for the benefit of present and future generations;

(7) to encourage the modernization or replacement of existing and new electric powerplants and major fuel-burning installations which utilize natural gas or petroleum as a primary energy source and which cannot utilize coal or other alternate fuels where to do so furthers the conservation of natural gas and petroleum;

(8) to require that existing and new electric powerplants and major fuel-burning installations which utilize natural gas, petroleum, or coal or other alternate fuels pursuant to this Act comply with applicable environmental requirements;

(9) to insure that all Federal agencies utilize their authorities fully in furtherance of the purposes of this Act by carrying out programs designed to prohibit or discourage the use of natural gas and petroleum as a primary energy source and by taking such actions as lie within their authorities to maximize the efficient use of energy and conserve natural gas and

petroleum in programs funded or carried out by such agencies;

(10) to insure that adequate supplies of natural gas are available for essential agricultural uses (including crop drying, seed drying, irrigation, fertilizer production, and production of essential fertilezer ingredients for such uses);

(11) to reduce the vulnerability of the United States to energy supply interruptions; and

(12) to regulate interstate commerce.

The purpose of Congress is clear; it wishes to further the attainment of the enumerated goals by decreasing the use of petroleum and natural gas as a boiler fuel. In their place, Congress would have the nation use coal.

The Fuel Use Act prohibits new electric powerplants from using oil or natural gas as a primary fuel source and prohibits the use of natural gas in existing facilities after 1989. Further, unless natural gas was used as a primary source during 1977, its use is banned before the January 1, 1990, deadline; plants meeting the 1977 usage exception are limited to their historical consumption. Exemptions from the regulations will be granted only in certain limited circumstances.

PREEMPTION

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), this Court noted that "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." Such conflict may occur "where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)]." *Id.* The Montana courts erred in rejecting this standard. The courts looked for an express congressional intent to prohibit a severance tax on coal. Under the *Hines v. Davidowitz* standard,

however, such express intent is not required. "Any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 412 U.S. 637, 652 (1971). A head-on conflict with a federal statute is unnecessary; preemption will occur where the state enactment impairs or frustrates the purpose of Congress. *See Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

The preemption standard, in summary, is not limited to a consideration of whether Congress "so occupied the field" such that state taxation is precluded, or whether Congress specifically prohibited state coal severance taxes. *See Ray v. Atlantic Richfield, supra.* The question, rather, is whether the thirty percent tax on coal frustrates and impairs the objectives of Congress in enacting its national energy policy.

FRUSTRATION OF THE NATIONAL PURPOSE

It is apparent from presidential statements and congressional action that there is a clear and definite federal scheme favoring increased use of coal in lieu of other energy sources. It is equally clear that the tax, insofar as it exacts an exorbitant surcharge for the use of Montana coal, serves to frustrate and impair the federal scheme and the express purpose of Congress to increase coal use.

For Texas and perhaps most of the West, western coal is as a practical matter the only coal available for use. Texas would show at trial on the merits that the high cost of transportation of eastern coal to Texas precludes its use. The use of coal from the Midwest is a break-even proposition only at Texas cities served by barge. When the added costs of inland rail transportation from dock to generating plants are added to the costs of pollution and pollution control for the higher sulphur content of midwestern coal, western coal is seen as being the only feasible alternative to the use of petroleum.

The thirty percent coal tax frustrates the use of western coal. In enacting its energy plan, the Congress

considered the effects of taxes on energy consumption. A bill was introduced, (Title II of H.R. 6831; 95th Cong., lst Sess.) to provide

> incentives to cut down energy consumption in the United States and to convert from the use of oil and gas to coal, nuclear power, and other more abundant energy sources. The bill raises taxes on many users of energy, particularly in cases where conservation or conversion from oil and gas is relatively easy. The bill also provides tax incentives to both individuals and businesses for investments to conserve energy or to convert to oil and gas to other energy sources.

H.R. REP. No. 95-496, 95th CONG.., 2d Sess. 3 (1978).

In its report on the bill, the Committee on Ways and Means stated, *inter alia*, that

> urgency of the energy problem requires a special measure designed specifically to reduce the consumption of oil and natural gas by large industrial and utility users. The cost of oil to these users must be raised to reflect the growing threat which unchecked oil imports pose to the security of the United States. The cost of natural gas must be raised because the existence of long-term regulated contracts has kept the price of natural gas below its replacement cost, thus encouraging too much consumption. At the same time, the revenue from the taxes used to achieve these cost increases should be employed to provide incentives for the purchase of new equipment which burns fuels other than oil or gas. The committee has therefore designed a combination of taxes and incentives which, it believes, will achieve a substantial reduction in oil and gas use.

Id at 94.

The Ways and Means Committee demonstrated its belief that one purpose of a tax on any specific type of energy is to decrease its use. On the other hand, tax reductions on a type of energy encourage the use of that energy type and further reduce the use of higher taxed energy sources. The coal tax effects a result opposite to that intended by Congress. The coal tax makes western coal more expensive which tends to reduce the consumption of coal relative to oil and gas, and thereby makes imported petroleum or natural gas more cost attractive.

Second, Congress has stated that the objectives of the Fuel Use Act were "to effect the conversion from natural gas and petroleum to coal or other domestic fuels to the greatest extent possible within reasonable economic and physical constraints." S.REP. No. 95-361, 95th CONG. 2d Sess. 37, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 8361. The potential benefits of attaining the objective of conversion to coal are many. An increase in the use of domestic energy sources will reduce the importation of foreign oil. National security will be enhanced by a lesser dependence on foreign energy sources. Further, the lowered demand for imported oil should reduce the price of the oil, or at least reduce the rate of increase in world oil prices. In turn, the United States' balance of payments will be positively affected, the value of the dollar will be strengthened, and there will be a corresponding downward pressure on the inflation rate.

The Montana tax, however, not only frustrates the objective of conversion, but contradicts the objective of promoting conversion "within reasonable economic and physical constraints." The tax increases costs of conversion to coal in derogation of the congressional purpose. Moreover, the increased cost to the purchaser does not have the countereffect of increasing producer revenues and thereby generating increased supply; the increased costs are paid as tax, not as an incentive as

contemplated by Congress, e.g. in the Natural Gas Policy Act of 1978, Pub. L. 95-621, providing for increased supplies of natural gas.

Finally, the Clean Air Act Amendments of 1977 demonstrate no intent by Congress to deviate from its clear policy of coal conversion. These amendments were initiated by certain congressmen from traditional coal producing states concerned that the demand for environmentally preferable, low-sulphur western coal would displace the demand for high-sulphur eastern and midwestern coal produced by their constituents. Rather than attempt to encourage the production of high-sulphur coal at the expense of western coal, Congress simply attempted to encourage eastern utilities to support their local mining industries by requiring all coal-fired plants to install certain pollution control devices. Apparently, Congress believed that if the high-sulphur coal were placed on an effective equal footing with low-sulphur western coal, coal production, employment and local economies in the East and Midwest would remain stable. Congress, in responding to political reality, evidenced no desire to retreat from its purpose of promoting coal conversion.

The Montana coal severance tax has the effect of contradicting, impairing and frustrating the attempts of Congress to meet the imperative energy problems facing this nation. Rather than reflecting the aims of Congress, the tax inhibits attainment of the goal of conserving large amounts of imported petroleum through conversion of electric generating facilities to the utilization of coal as a primary energy source. As the price of coal to the user increases, there will be a reduction in usage, to the effect that either other fuels such as oil and gas will be substituted, or there will be a net reduction in energy devoted to productive ends. Such a result is contrary to the federal scheme of energy priority and therefore not permitted by the Supremacy Clause.

As the foregoing demonstrates, the national energy policy attempts to reduce importation of foreign petroleum by promoting the increased use of coal. The State of Texas respectfully submits that the courts below have misconstrued the intent of the federal scheme and the need to determine whether the coal severance tax "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Ray v. Atlantic Richfield, supra,* 435 U.S. at 158.

CONCLUSION

This Court long ago held that

> [t]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). The Constitution provides that in our balanced federal system, the Constitution and enactments of Congress shall be the supreme law of the land. Any state laws frustrating the intent of Congress shall be invalid.

The coal severance tax clearly conflicts with the imperative purpose expressed by Congress. Coal is made more expensive, which either lessens the conversion from oil and natural gas to coal, or reduces the utilization of domestic energy resources, impairing the economic health of this nation. The tax frustrates the avowed aims of Congress in dealing with perhaps the most critical concern of the remainder of this century. The Montana courts have erred in their construction of the federal scheme, the conflict between the tax and the laws of Congress, and the necessary standard to be applied in viewing the conflict.

Accordingly, the State of Texas respectfully requests that the decision of the Montana courts be reversed.

Respectfully submitted

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY III
Executive Assistant
Attorney General

JAMES R. MEYERS
Assistant Attorney General
Chief, Federal Energy Section

JUSTIN ANDREW KEVER
Assistant Attorney General
Chief, Federal Energy Section

JOHN STUART FRYER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512)479-8191

Attorneys for the State of Texas

No. 80-581

In the Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, ET AL., APPELLANTS

v.

STATE OF MONTANA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

EDWARD J. SHAWAKER
CHRISTOPHER KIRK HARRIS
RICHARD J. LAZARUS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-581

COMMONWEALTH EDISON COMPANY, ET AL., APPELLANTS

v.

STATE OF MONTANA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether, conceding that the Mineral Lands Leasing Act of 1920 permits a state to impose some tax on a lessee who severs coal from federal lands, the Montana Coal Severance Tax, as applied to the mining of federally owned coal in that State, is nevertheless inconsistent with the Mineral Lands Leasing Act and therefore invalid under the Supremacy Clause of the Constitution because of the amount of the tax.

2. Whether, conceding that federal legislation governing the development and use of energy resources does not bar states from imposing some tax on the severance of coal, the Montana Coal Severance Tax is nevertheless inconsistent with federal energy legislation and therefore invalid under the Supremacy Clause of the Constitution because of the amount of the tax.

3. Whether, conceding that the Interstate Commerce Clause of the Constitution does not, of its own force, bar

a state from imposing some tax on the severance of coal within its borders, the rate of the Montana Coal Severance Tax is impermissible under the Commerce Clause either because it is not "fairly related" to the services furnished to coal producers by the State of Montana or because most of the coal mined in Montana is shipped out of the State.

TABLE OF CONTENTS

Argument:	Page
Introduction and summary	1
I. As applied to the mining of federally owned coal, the Montana Coal Severance Tax is authorized by and therefore is not preempted by the Mineral Lands Leasing Act of 1920	5
II. The Montana Coal Severance Tax is not preempted by the federal policy favoring the use of coal	14
III. The Montana Coal Severance Tax is not unconstitutional under the Commerce Clause	21
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Arizona Public Service Co. v. *Sneed*, 441 U.S. 141	2
Ass'n of American Railroads v. *Costle*, 562 F.2d 1310	15
Bissette v. *Colonial Mortgage Co.*, 477 F.2d 1245	15
Boston Stock Exchange v. *State Tax Comm.*, 429 U.S. 318	24
Budget Rent-A-Car of Washington v. *Multnomah County*, 597 P.2d 1232	29
Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495	5, 27, 30
Carter v. *Carter Coal Co.*, 298 U.S. 238	15
Colonial Pipeline Co. v. *Traigle*, 421 U.S. 100	28
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274	5, 21, 28
Connecticut General Life Ins. Co. v. *Johnson*, 303 U.S. 77	29
Evansville Airport v. *Delta Airlines*, 405 U.S. 707	30-31
Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117	16

Cases—Continued Page

Exxon Corp. v. *Wisconsin Dep't of Revenue*, No. 79-509 (June 10, 1980) 22, 23, 27, 30
General Motors Corp. v. *Washington*, 377 U.S. 436 ..... 28, 29
Heisler v. *Thomas Colliery Co.*, 260 U.S. 245 ..... 4, 21, 23, 24, 26
Hines v. *Davidowitz*, 312 U.S. 52 17
H. P. Hood & Sons, Inc. v. *DuMond*, 336 U.S. 525 22
Hughes v. *Oklahoma*, 441 U.S. 322 ..... 22, 23, 24
Hughes Tool Co. v. *Meier*, 486 F.2d 593 15
Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 24
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 ..... 27, 30
Lauf v. *E. G. Shinner & Co.*, 303 U.S. 323 15-16
Lehigh & New England Ry. v. *ICC*, 540 F.2d 71, cert. denied, 429 U.S. 1061 15
Lewis v. *B T Investment Managers, Inc.*, No. 79-45 (June 9, 1980) 23, 24
McLain v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 22
McLeod v. *J. E. Dilworth Co.*, 322 U.S. 327 24
Mid-Northern Oil Co. v. *Montana*, 268 U.S. 45 ..... 3, 9, 10, 14
Mobil Oil Corp. v. *Commissioners of Taxes*, 445 U.S. 425 27
Nat'l Bellas Hess, Inc. v. *Illinois Revenue Dep't*, 386 U.S. 753 29
Nat'l Geographic Society v. *California Board of Equalization*, 430 U.S. 551 ..... 27, 28, 29
Nippert v. *Richmond*, 327 U.S. 416 29
Oliver Iron Mining Co. v. *Lord*, 262 U.S. 172 24
Philadelphia v. *New Jersey*, 437 U.S. 617 ..... 23, 24, 25
Pittsburgh v. *Alco Parking Corp.*, 417 U.S. 369 27
Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 17
Reeves, Inc. v. *Stake*, No. 79-677 (June 19, 1980) .. 25
Schlesinger v. *Reservists Committee To Stop The War*, 418 U.S. 208 8
Sinclair Refining Co. v. *Atkinson*, 370 U.S. 195 15
Standard Pressed Steel Co. v. *Wash. Revenue Dep't*, 419 U.S. 560 29

Cases—Continued Page

Train v. *City of New York*, 420 U.S. 35 16
United States v. *Richardson*, 418 U.S. 166 8
Ventura County v. *Gulf Oil Corp.*, 601 F.2d 1080, aff'd, 445 U.S. 947 10
Washington Revenue Dep't v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 ..... 27, 30
West v. *Kansas Natural Gas Co.*, 221 U.S. 229 24
Western Livestock v. *Bureau of Revenue*, 303 U.S. 250 ..... 26, 28
White Mountain Apache Tribe v. *Bracker*, No. 78-1177 (June 27, 1980) 14
Wickard v. *Filburn*, 317 U.S. 111 23
Wisconsin v. *J. C. Penney Co.*, 311 U.S. 435 ..... 28, 29
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 15
Yazoo & Mississippi Valley R.R. v. *Thomas*, 132 U.S. 174 15

Constitution, statutes and regulations:

United States Constitution:

Preamble 3
Art. I, § 8, cl. 3 (Commerce Clause) 1, 4, 22, 23, 27
Art. VI, cl. 2 (Supremacy Clause) 1, 15
Fourteenth Amendment (Due Process Clause) 27

Clean Air Act, 42 U.S.C. (& Supp. III) 7401 *et seq.* 21

42 U.S.C. (Supp. III) 7411, (as amended by Pub. L. No. 95-190, Section 14(a)(7)-(9), 91 Stat. 399 21
42 U.S.C. (Supp. III) 7421, (as amended by Pub. L. No. 95-95, Section 120(a), 91 Stat 720 21

Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, Section 2(6), 89 Stat. 871, 42 U.S.C. 6201(6) 15

Constitution, statutes and regulations—Continued Page

Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083 *et seq.*:

Section 2, 90 Stat. 1083 7
Section 4, 90 Stat. 1085 7
Section 6, 90 Stat. 1087 7
Section 9(a), 90 Stat. 1089 6
Section 14, 90 Stat. 1091 7

Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Section 317, 90 Stat. 2770.... 6

Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. 396a-396g 14

Mineral Land Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.* 3

Section 32, 30 U.S.C. 189 ..... 3, 8, 9, 12, 13, 14
Section 35, 30 U.S.C. (1970 ed.) 191 6
Section 35, 30 U.S.C. 191 ..... 6, 12, 13
Section 2, 30 U.S.C. (1970 ed.) 201 7
Section 2(a), 30 U.S.C. (1970 ed.) 201(a).. 7, 13
Section 2(b), 30 U.S.C. (1970 ed.) 201(b).. 7
Section 7, 30 U.S.C. (1970 ed.) 207 ..... 6, 13, 14
Section 39, 30 U.S.C. (1970 ed.) 209, as added by ch. 845, 47 Stat. 798, and amended by ch. 916, Section 10, 60 Stat. 957 ..... 6, 7

Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3352, 15 U.S.C. (Supp. III) 3301 *et seq.* 18

Section 101-110, 15 U.S.C. (Supp. III) 3311-3320 18
Section 110(a)(1), 15 U.S.C. (Supp. III) 3320(a)(1) 18

Powerplant and Industrial Fuel Use Act of 1978 (PIFUA), Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III) 8301 *et seq.* 4

Section 102(b)(3), 42 U.S.C. (Supp. III) 8301(b)(3) 15

Constitution, statutes and regulations—Continued Page

Section 201(1), 42 U.S.C. (Supp. III) 8311(1) 16
Section 202(a), 42 U.S.C. (Supp. III) 8312(a) 16
Sections 211-212, 42 U.S.C. (Supp. III) 8321-8322 17
Section 211(a)(1), 42 U.S.C. (Supp. III) 8321(a)(1) 17
Section 211(a)(3), 42 U.S.C. (Supp. III) 8321(a)(3) 18
Section 211(e)(2)(A), 42 U.S.C. (Supp. III) 8321(e)(2)(A) 17
Section 212(a)(A), 42 U.S.C. (Supp. III) 8322(a)(1)(A) 17
Section 212(a)(C), 42 U.S.C. (Supp. III) 8322(a)(1)(C) 18
Section 212(b), 42 U.S.C. (Supp. III) 8322(b) 18
Sections 301-303, 42 U.S.C. (Supp. III) 8341-8343 16
Sections 301-312, 42 U.S.C. (Supp. III) 8341-8352 17
Section 301(b)(3), 42 U.S.C. (Supp. III) 8341(b)(3) 17
Section 302(a)(3), 42 U.S.C. (Supp. III) 8342(a)(3) 17
Section 311(a)(1), 42 U.S.C. (Supp. III) 8351(a)(1) 17
Section 311(h)(2)(A), 42 U.S.C. (Supp. III) 8351(h)(2)(A) 17
Section 312(a)(A), 42 U.S.C. (Supp. III) 8352(a)(1)(A) 17
Section 312(a)(C), 42 U.S.C. (Supp. III) 8352(a)(1)(C) 18
Section 312(b), 42 U.S.C. (Supp. III) 8352(b) 18
Section 601(a)(1), 42 U.S.C. (Supp. III) 8401(a)(1) 4, 19
Section 601(a)(2), 42 U.S.C. (Supp. III) 8401(a)(2) 19, 20

Constitution, statutes and regulations—Continued Page

Reclamation Act of 1902, ch. 1093, Section 1, 32 Stat. 388, 43 U.S.C. 391 6
42 U.S.C. (Supp. II) 7152(b) and 7153 13
40 C.F.R. § 60.40(a)-60.49(2)(a) 21
43 C.F.R.:

Section 3400.0-5(s) 13
Section 3430.0-7 7
Section 3473.3-1(a) 7

Miscellaneous:

Coal Severance Taxes: Hearings on H.R. 6625, H.R. 6654, and H.R. 7163 before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. (1980) 2
Comment, *The Powerplant and Industrial Fuel Use Act of 1978: Fuel Replacement*, 3 Harv. Envt'l L. Rev. 214 (1979) 17
51 Cong. Rec. (1914):

p. 14953 10
pp. 14954-14955 10
p. 15039 10
p. 15055 10
p. 15060 10

53 Cong. Rec. (1916):

pp. 980-981 10

58 Cong. Rec. (1917):

pp. 7770-7774 10

122 Cong. Rec. (1976):

p. 515 11
p. 519 11
p. 19376 11

Developments in the Law, Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953 (1962) 25, 30

Miscellaneous—Continued

	Page
43 Fed. Reg. 42160 (1978)	21
44 Fed. Reg. (1979):	
p. 33583	21
p. 33596	21
45 Fed. Reg. (1980):	
p. 8213	21
p. 84928	7
p. 84933 (10 C.F.R. 378.111)	13
P. Gates, *History of Public Land Law Development* (1968)	10
Hellerstein, *Constitution Constraints on State and Local Taxation of Energy Resources*, 31 Nat'l Tax J. 245 (1978)	25, 26
H.R. 16136, 63d Cong., 2d Sess. (1914)	10
H.R. Conf. Rep. No. 95-1749, 95th Cong., 2d Sess (1978)	18, 19
H.R. Rep. No. 668 (Pt. 2), 63d Cong., 2d Sess. (1914)	10
H.R. Rep. No. 95-299, 95th Cong., 1st Sess. (1977)	21
H.R. Rep. No. 96-1527 (Pt. 1), 96th Cong., 2d Sess. (1980)	2, 12
Oversight on Federal Coal Leasing: Oversight Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 94th Cong. 2d Sess. (1976)	11-12
R. Posner, *Economic Analysis of Law* (2d ed. 1977)	8, 25
S. 2775, 66th Cong., 1st Sess. (1919)	10
S. 4898, 63d Cong., 2d Sess. (1914)	10
S. Rep. No. 985, 75th Cong., 1st Sess. (1938)	14
Secretarial Issue Document; Fair Market Value and Minimum Acceptable Bids on Federal Coal Leases C-1 (May 28, 1980)	13
1A C. Sands, *Sutherland Statutes and Statutory Construction* (4th ed. 1972)	15

Miscellaneous—Continued Page

U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act*, Vol. II (1978) 20

U.S. Dept. of the Interior, *Final Environmental Statement: Federal Coal Management Program* (1979) 13

U.S. Department of Justice, Antitrust Division, *Competition in the Coal Industry* (1980) 8, 13

This brief is submitted in response to the Court's invitation of December 8, 1980.

ARGUMENT

INTRODUCTION AND SUMMARY

Appellants assert that the Montana Coal Severance Tax, imposed at a rate of up to 30 percent, is in conflict with federal legislation and therefore invalid under the Supremacy Clause of the Constitution, Art. VI, cl. 2, and that it discriminates against and creates an undue burden on interstate commerce in violation of the Interstate Commerce Clause of the Constitution. Art. I, § 8, cl. 3. They do not argue that federal legislation and the Commerce Clause prohibit the State of Montana from imposing *any* severance tax on the mining of coal within its borders. Indeed, appellants conceded in the Montana Supreme Court that the State may levy some tax, perhaps 12½ to 15% of the value of the coal (J.S. App. 9a). As that Court observed, appellants argue only "that at some point not specified, between fifteen to thirty percent of the value of the coal, Montana's coal severance tax butts into the lintel of federal impermissibility" (*ibid.*).

Thus, under each of their arguments, appellants ask this Court to fashion a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of property or activities that appellants concede have traditionally been regarded as legitimate subjects of state taxation. It may be doubted whether a legal test can be fashioned that would adequately take into account the myriad—and competing—economic, geographic, demographic, social and political considerations that must inform a determination of an acceptable rate or level of state taxation, and yet be reasonably capable of application in a broad range of individual cases. But the difficulty of the judicial undertaking to one side, the nature of the fact-finding and

judgment that would be entailed only reinforces the conclusion that the appropriate level of state taxation is, under our federal system, fundamentally a political matter for legislative resolution—by the states in the first instance and, if necessary, by Congress, when particular state levies are thought to be contrary to federal interests. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979).

The present controversy has not escaped the attention of Congress. Several bills were introduced during the 96th Congress to limit the rate of state severance taxes (S. 2695, H.R. 5294, H.R. 6625, H.R. 6654 and H.R. 7163), and one was introduced to limit the rate applied to energy resources extracted from federal and Indian lands (S. 1778). On December 4, 1980, the House Committee on Interstate and Foreign Commerce reported on H.R. 6625, which would have limited state coal severance taxes to a rate of 12½%. The bill was recommended with the Montana tax specifically in mind. See H.R. Rep. No. 96-1527 (Pt. 1), 96th Cong., 2d Sess. 3-8, 14 (1980). Similar bills have been introduced in the 97th Congress (S. 178, H.R. 1313).

Appellants have urged the passage of such legislation,[1] but, failing that, they ask the courts to impose a comparable limitation. Judicial intervention is necessary, they argue, because if the Montana tax ultimately is upheld, it "foreshadows a trend in state taxation of energy resources which can only lead to the Balkanization of this Nation in the same way that OPEC's efforts have fragmented the world economy" (Br. 7; see also *id.* at 5-6, 9-10, 25). They also see in the tax a threat to a national policy favoring the use of domestic coal to meet the nation's energy needs (Br. 35-46).

We must, of course, be apprehensive of any tendency toward the Balkanization of the nation according to the relative wealth or scarcity of energy resources in the

---

[1] See *Coal Severance Taxes: Hearings on H.R. 6625, H.R. 6654, and H.R. 7163 before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 93-132 (1980) (hereinafter "*Hearings*").

various regions or states. We must be concerned as well that the nation meet its energy needs and that it do so without imposing unwarranted burdens on consumers or bestowing undue windfalls on those who might seek to profit from shortage. But the issue in this case is not the economic or political wisdom of the state taxing measure under review. More is needed for a court to strike down a state statute as repugnant to the Federal Constitution than a conviction that the statute will cause disharmony among the states or is contrary to the welfare of the nation, even if it is assumed that appellants would make such a showing in this case. The focus of constitutional analysis must be on the terms of the specific constitutional and statutory provisions through which the Framers and Congress have sought to "form a more perfect Union" and "promote the general Welfare." United States Constitution, Preamble. We are unable to conclude that Montana's Coal Severance Tax is repugnant to the Commerce Clause and the specific statutory provisions upon which appellants rely or that appellants must be given an opportunity to make a factual showing before the tax may be sustained.

1. Appellants contend that the Montana tax, as applied to the mining of federally owned coal, is inconsistent with the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*, because it has the effect of diverting to the State of Montana a major portion of the revenues that would otherwise be captured by the United States. However, in Section 32 of the 1920 Act, Congress provided that "nothing in this chapter shall be construed or held to affect the rights of the States * * * to levy and collect taxes upon * * * output of mines, * * *." By virtue of Section 32, federal lessees are not "exempt from any form of state taxation otherwise lawful." *Mid-Northern Oil Co.* v. *Montana*, 268 U.S. 45, 50 (1925). The 1920 Act therefore has no independent preemptive force. In any event, the Mineral Lands Leasing Act of 1920 is intended to ensure only a "fair return" from leasing, not to maximize the re-

covery of "economic rents," with which the Montana tax could be said to interfere.

2. Appellants assert that the Montana tax is preempted because it frustrates a national "policy" favoring the use of coal. But the only specific statutory provisions —other than general prefatory language in several acts— cited by appellants are those in the Powerplant and Industrial Fuel Use Act (PIFUA) of 1978, 42 U.S.C. (Supp. III) 8301 *et seq.* But although that Act mandates the use of coal instead of oil and natural gas, it cannot, without more, be thought to manifest a clear congressional purpose to preempt state law merely because that law may make the use of coal more expensive. In any event, Section 601(a)(2) of PIFUA expressly contemplates the existence, not preemption, of severance taxes by providing that such taxes will be "taken into account" in allocating certain impact aid to the states. The legislative history reveals that this measure was drafted with the Montana tax specifically in mind.

3. We agree with appellants' argument that the coal severance tax is not immune from Commerce Clause scrutiny on the theory that mining is "local", not interstate commerce. But it does not follow that *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922), was incorrectly decided or that the Montana tax is invalid, given a state's strong interest in taxing the extraction of its depletable resources.

Appellants' contention that the Montana tax discriminates against interstate commerce because its burden is borne primarily by out-of-state consumers must be rejected. The tax is imposed at the same rate whether or not it is shipped out of state and is therefore nondiscriminatory. Moreover, appellants' argument that a tax such as this can be found to be discriminatory depends on an assertion that the state is exploiting a "monopoly" position that enables it to export the tax burden. Proof of this assertion would entail a complex economic analysis of market demand and the economic incidence of taxation and would infuse foreign principles of antitrust law into the Commerce Clause.

Finally, appellants err in arguing that the tax is not "fairly related to the services furnished by the State" under the fourth prong of the test set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Contrary to appellants' assertion, this test does not require that the amount of the state tax must be roughly equivalent to the value of services the taxpayer receives in return. This Court made clear in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937), that the Due Process Clause of the Fourteenth Amendment does not require that taxes be assessed only in return for services furnished to the taxpayer, and the Commerce Clause does not require a different result merely because there is a nexus to interstate commerce. The "fairly related" test requires only that the tax be measured by or levied in "proper proportion" to the taxpayer's activities or presence in the state. The Montana tax, measured as a percentage of the value of the coal taken, plainly is in "proper proportion" to the activities of coal producers in the State.

I

AS APPLIED TO THE MINING OF FEDERALLY OWNED COAL, THE MONTANA COAL SEVERANCE TAX IS AUTHORIZED BY AND THEREFORE IS NOT PREEMPTED BY THE MINERAL LANDS LEASING ACT OF 1920

Appellants contend (Br. 45-50; Comp. ¶¶ 34-44, J.S. App. 56a-59a) that the Montana Coal Severance Tax, as applied to the mining of federally owned coal, is inconsistent with the Mineral Lands Leasing Act and therefore is invalid under the Supremacy Clause of the Constitution. They argue that under the Leasing Act of 1920, the "economic rents" attributable to the extraction of federally owned coal—*i.e.*, the difference between the market price of the coal and the cost of its production (including a reasonable profit for the producer)—are to be captured by the federal government in the form of payments made by coal producers pursuant to leases issued under the Act. The payments thus received are then to be divided between the states and the federal govern-

ment according to a statutory formula that, at present, provides for the states in which the mining occurs to receive 50% of the revenues, the reclamation fund to receive 40%, and the Treasury of the United States to retain the remaining 10%. 30 U.S.C. 191.[2]

Appellants contend that Montana's coal severance tax is so excessive in amount that it seriously undercuts and disrupts the "compromise" reflected in this division of revenues between the federal government and the states by appropriating directly to the State of Montana a major portion of the "economic rents." This is so, it is argued, because potential coal producers, "in calculating the amount they are willing to bid in royalties[3] for

---

[2] Section 35 of the Mineral Lands Leasing Act, ch. 85, 41 Stat. 450, 30 U.S.C. (1970 ed.) 191, as originally enacted in 1920, provided that all money received from the leasing of public lands pursuant to the Act was to be paid into the United States Treasury and then divided as follows: 37½% to the state in which the leased lands are located to be used for roads and education; 52½% to the reclamation fund created by the Reclamation Act of 1902 (ch. 1093, Section 1, 32 Stat. 388, 43 U.S.C. 391); and the remaining 10% to miscellaneous receipts in the Treasury.

Section 35 was amended by Section 9(a) of the Federal Coal Leasing Amendments Act (FCLAA) of 1976 (Pub. L. No. 94-377, 90 Stat. 1089) to provide for the division of royalties set forth in the text. Section 35 was further amended by Section 317 of the Federal Land Policy and Management Act of 1976 (Pub. L. No. 94-579, 90 Stat. 2770) to delete the requirement that the states' share of revenues be devoted to schools and road construction and to direct the states, instead, to give priority in spending the proceeds to facilities and services in those areas of the state that would experience an economic or social impact from leasing activities.

[3] The federal government receives revenues in three principal forms: bonuses, royalties, and an annual rental charge for the acreage leased. At present, bidders compete according to the amount of *bonus* they will pay; the *royalty* is fixed. Section 7 of the Mineral Lands Leasing Act of 1920 (ch. 85, 41 Stat. 439, 30 U.S.C. (1970 ed.) 207) originally provided for payment of a royalty on federally owned coal of at least five cents per ton and an annual rental of not less than 25 cents per acre in the first year and not less than one dollar per acre after five years. (In Section 39 of the 1920 Act, 30 U.S.C. (1970 ed.) 209, as added in 1933 (ch. 45, 47 Stat. 798), and amended in 1946 (ch. 916, Sec-

federal leases, will necessarily compute the amount of state tax payable on production and must naturally reduce the amounts they are willing to bid for royalties accordingly" (Br. 47; footnote omitted).

The factual premise implicit in this argument—that the principal effect of the tax is to shift a major portion of the relatively fixed "economic rents" attributable to the extraction of federally owned coal from the Federal Treasury to the State of Montana—is inconsistent with the premises underlying their other arguments, which we address in Points II and III, *infra*. There, appellants argue that the effect of the tax is to increase the cost of Montana coal, thereby *increasing* the total amount of

---

tion 10, 60 Stat. 957), Congress authorized the Secretary to waive, suspend, or reduce the rental or minimum royalty, and reduce the production royalty, whenever necessary to promote development or whenever leases cannot be operated successfully under the terms provided). Section 2(a) of the 1920 Act (ch. 85, 41 Stat. 438, 30 U.S.C. (1970 ed.) 201(a)) provided for leasing by competitive bidding—which would yield a bonus at the outset of the lease—or by such other method as the Secretary adopted. Section 2(b), ch. 85, 41 Stat. 438, 30 U.S.C. (1970 ed.) 201(b), also authorized the Secretary to issue prospecting permits where exploration was necessary to determine the existence or workability of coal deposits on particular tracts; if the permittee demonstrated the existence of coal, he was entitled to lease the tract on a noncompetitive basis. Under the original Act, then, land was not always leased on a competitive basis and, therefore, did not always yield the bonus attributable to competitive bidding.

In Section 7 of FCLAA (90 Stat. 1087), Congress increased the royalties on coal to a minimum of 12½% of market value and provided for the Secretary to establish per acre rental charges by regulation. See 43 C.F.R. 3473.3-1(a). Sections 2 and 4 of the FCLAA, 90 Stat. 1083 and 1085, amended Section 2 of the 1920 Act (30 U.S.C. (1970 ed.) 201) to require competitive bidding in all cases, see 45 Fed. Reg. 84928 (1980), and to replace the prospecting permit-leasing system with a system of exploration under licenses issued by the Secretary that give no right or preference to a subsequent lease. See 43 CFR. 3430.0-7. The FCLAA also retained the authority of the Secretary in Section 39 of the Mineral Lands Leasing Act of 1920 to waive, suspend, or reduce rental or royalty payments, but, in Section 14 of the FCLAA (90 Stat. 1091), added a proviso barring the Secretary from waiving *advance* royalties.

"economic rents," and that the burden of the tax is borne by out-of-state consumers, not the Federal Treasury. Indeed, appellants allege that the existing contracts between the 11 appellant utility companies and the four appellant coal producers *require* that the utility companies reimburse the coal producers for their severance tax payments and that the ultimate burden of the tax falls upon the utilities' customers (Comp. ¶¶ 17, 18; J.S. App. 53a-54a). As to these contracts, then, the federal government's revenues presumably will be substantially unaffected by the tax, particularly because the bonuses, royalties, and rentals to be paid to the federal government would have been established in leases entered into before the coal producers commenced mining to satisfy their contracts with the utilities.

However, even if it is conceded that the Montana Coal Severance Tax may have some impact on the total income received by the federal government under leases entered into in Montana, this hardly proves that the tax is inconsistent with the Mineral Lands Leasing Act.[4] Indeed, the most basic obstacle to any such conclusion is that, in Section 32 of the 1920 Act (30, U.S.C. 189), Congress authorized the states to collect severance taxes

---

[4] On new leases, it does seem likely that the burden of the severance tax will be shared among the Federal Treasury, coal producers, and ultimate consumers. As the Montana Supreme Court observed (J.S. App. 24a), it cannot be assumed that all of the tax would be passed on to consumers, through utilities, because Montana does not have a monopoly in the production of coal. Its coal must compete with that produced in Wyoming, North Dakota, and elsewhere. See also U.S. Dep't of Justice, Antitrust Division, *Competition in the Coal Industry*, 25-31 (1980). Therefore, the state's tax might well diminish to some extent the amount a coal producer is prepared to pay to the federal government. R. Posner, *Economic Analysis of Law* 367 (2d ed. 1977). It is not clear, however, what cause appellants have to complain about an asserted distortion in the division of "economic rents." That would appear to be a matter between the United States and the State of Montana. Cf. *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974).

without imposing any express limitation on the amount of such taxes.

Section 32 provides, in pertinent part:

> Nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

In construing Section 32 soon after its enactment, this Court stated:

> Congress, having provided for leasing the public lands to private corporations and persons whose property, income, business and occupations ordinarily were subject to state taxation, meant by the proviso to say in effect that, although the act deals with the letting of public lands and the relations of the government to the lessees thereof, nothing in it shall be so construed as to affect the right of the states, in respect of such private persons and corporations, *to levy and collect taxes as though the government were not concerned.*
>
> * * * * *
>
> * * * We think the proviso plainly discloses the intention of Congress that *persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful.*

Mid-Northern Oil Co. v. *Montana*, 268 U.S. 45, 48-50 (1925) (emphasis added). It is plain, then, that for purposes of a state's power to tax, the lessees of federal lands are to be treated the same as lessees of private lands.[5] It necessarily follows that if the Montana Coal

---

[5] Treating the lessees of federally owned lands, for taxing purposes, *as if* they were lessees of privately owned lands is consistent with the background of the 1920 Act, which reflects a compromise between those Members of Congress who believed the lands should

Severance Tax is "otherwise lawful" (*Mid-Northern Oil Co.* v. *Montana, supra,* 268 U.S. at 50)—*i.e.*, in the present case, if the tax does not conflict with federal energy legislation or the requirements of the Commerce Clause—those appellants who are "contracting with the United States under the [Leasing Act], should not, for that reason, be exempt" from the severance tax. 268 U.S. at 50.[6]

---

be retained in public ownership and those who believed the lands should be sold into private hands.

Mineral lands leasing legislation was first introduced in 1914. H.R. 16136, S. 4898, 63d Cong., 2d Sess. (1914). Controversy over the loss of state revenues was a major obstacle to the bill's passage. Representatives of the western states in which the mineral lands were located claimed that retention of the lands in federal ownership was a violation of the Equal Footing Doctrine because, in their view, the states had entered the Union upon a solemn compact that lands would be "allowed to go into private ownership to help maintain the State government * * *." H.R. Rep. No. 668 (Pt. 2), 63d Cong., 2d Sess. 6 (1914) (minority views). They complained that their states would lose large amounts of real estate tax revenues that royalties would not replace, and they questioned whether states had the authority to receive revenue from output taxes instead. See 51 Cong. Rec. 14953, 14954-14955, 15039, 15055, 15060 (1914). Sponsors of the legislation responded that the royalties would compensate the states for loss of real estate tax revenues and that, of course, the states possessed the power to tax the output of the mines in the same manner as minerals taken from private lands. See *id.* at 15064-15065, 15558-15559. See also 53 Cong. Rec. 980-981 (1916).

In 1919, the legislation which was eventually to become the Mineral Lands Leasing Act of 1920 was introduced. S. 2775, 66th Cong., 1st Sess. (1919). The debates between supporters and opponents of the bill were similar to those that had occurred five years earlier. See, *e.g.* 58 Cong. Rec. 7770-7774 (1919); see generally P. Gates, *History of Public Land Law Development* 738-745 (1968) (published by the Public Land Law Rev. Comm.).

[6] This conclusion is fully compatible with the decision in *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980). There, the Ninth Circuit found that the Mineral Lands Leasing Act preempted county zoning ordinances that required oil and gas operators on federal lands to obtain county drilling and exploration permits. Montana is not purporting to

In the Federal Coal Leasing Amendments Act of 1976, Congress amended the Mineral Lands Leasing Act in a number of respects, by, *e.g.*, increasing the royalty rate, allocating a greater portion of royalties to the states, and providing for competitive bidding under all circumstances. See note 2, *supra*. The legislative history reveals that Congress was aware of Montana's severance tax. For example, Senator Metcalf, the floor manager of the bill, stated in response to criticism of the increase in the royalty rate:

> There is no evidence to support the allegation that a 12.5-percent minimum royalty would preclude coal development on Federal lands. On the contrary, this proposed rate is entirely commensurate with royalties and taxes already on the books. *The State of Montana recently enacted coal taxes above 20 to 30 percent—depending on the quality of the coal—with no significant reduction to coal production evident.*

122 Cong. Rec. 19376 (1976) (emphasis added).[7] Congress' failure, in these circumstances, to amend Section

---

prohibit or regulate the manner of leasing that Congress has specifically authorized. Furthermore, in contrast to the express authorization of state taxation contained in Section 32 of the 1920 Act, the federal statutory scheme for oil and gas leasing contains no explicit provision allowing state permit systems such as that involved in *Ventura County*.

[7] See also 122 Cong. Rec. 515 (1976) (Rep. Mink) (noting that severance taxes are paid in Montana on the mining of federally owned coal and that the legality of such taxes will be litigated, but that the matter of states taxes "is not covered" by the 1976 legislation); *id.* at 519 (Rep. Myers) ("[a]lthough coal is mined on Federal land leases, the States still can inflict whatever taxes they want on the corporation for the coal that comes out of the Federal Lands").

In House oversight hearings on the federal coal leasing program held in the Spring of 1976, before the 1976 amendments were passed, an Interior Department witness informed the subcommittee of the Department's view that Montana's authority to impose the 30% tax was "expressly reserved in the Mineral Leasing Act" and that "barring a finding by the courts that it might be unconstitutional, that is clearly within the State's authority." ***Oversight on Federal Coal Leasing: Oversight Hearings Before***

32 of the Mineral Lands Leasing Act of 1920 reinforces the view that the Montana tax is valid. This same view is reflected in the recent House committee report on the bill to limit the Montana severance tax to a rate of 12½% (see page 2, *supra*), which concludes that "the States are given the right to tax [production of federal coal] in the same manner and to the same extent as if Federal lands were not included." H.R. Rep. No. 96-1527 (Pt. I), *supra*, at 8. We therefore do not find in the language, legislative history, or legislative, executive, and judicial interpretation of the Mineral Lands Leasing Act of 1920 and the 1976 amendments to that Act any basis for concluding that Montana's coal severance tax cannot be applied to the extraction of federally owned coal in the State.

Nor do we find any support for such a conclusion in appellants' largely theoretical proposition that Congress intended to maximize and capture (through bonuses, royalties, and rents) all "economic rents" attributable to extraction of federally owned coal and then to distribute the proceeds according to the formula set forth in Section 35 of the 1920 Act, 30 U.S.C. 191. Appellants cite nothing in the language or legislative history of the Act or the 1976 amendments to support their argument, and we are aware of nothing. The House Report on the 1976 amendments, for example, expresses a congressional intent to secure only a "fair return to the public" (H.R. Rep. No. 94-681, 94th Cong., 1st Sess. 17-18 (1975)), not whatever return the federal government's dominant position in the western coal market might command. This purpose is reflected as well in regulations recently issued

---

the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess. 65 (1976). See also *id.* at 91. The Department did note, however, that in some circumstances, courts have found that legislative measures "set forth as exercises of the taxing authority have in fact had as their principal purpose the prohibition of the activity so regulated" and that it "would be assumed that the same legal principles and test would be applicable to the State severance taxes imposed upon the mining of coal." *Id.* at 91.

by the Department of Energy that identify the "purposes and policies" that Department will consider in determining whether to disapprove certain terms and conditions in leases to be issued by the Secretary of the Interior. See 42 U.S.C. (Supp. II) 7152(b) and 7153. These "purposes and policies" include providing a "fair return" to the federal government, as well as fostering production and minimizing coal prices. Although the Department notes that it will consider the "relationship between economic rent and government revenue," this is only one of 21 factors that will be taken into account. See 10 C.F.R. 378.111, as added, 45 Fed. Reg. 84933 (1980).[8]

Even if we were able to agree, however, that Congress sought in general to maximize the return from federal leases, we still could not agree with appellants' argument that Montana's tax may not be applied to federally owned coal. That argument necessarily depends on inferences to be drawn from Sections 7 and 35 of the 1920 Act (30 U.S.C. 207 and 191), which, as amended, provide for increased bonuses and royalties and a more favorable allocation of those proceeds to the states. Comp. ¶¶ 38-41; J.S. App. 57a-58a. Yet Section 32 of the 1920 Act pro-

---

[8] Section 2(a) of the Act, 30 U.S.C. 201(a), also provides that no lease shall be issued for less than "fair market value." This term is defined in a regulation issued by the Secretary, 43 C.F.R. 3400.0-5(s), and further elaborated upon in *Secretarial Issue Document; Fair Market Value and Minimum Acceptable Bids on Federal Coal Leases*, C-1 (May 28, 1980). It is clear from the latter that the Interior Department does not seek to obtain the maximum revenue. See *Competition in the Coal Industry*, note 4, *supra*, at 8-10 & n.24.

The government has established production projections for western coal regions. U.S. Dept. of the Interior, *Final Environmental Statement: Federal Coal Management Program* 2-32 (1979). In establishing its production targets, however, the Department takes into account that Montana and other western states impose severance taxes. See International Consulting Firm, Inc., *Final Report, the Demand for Western Coal and Its Sensitivity to Key Uncertainties* 15 (1978) (used by the Department to set coal production goals).

vides that "[*n*]*othing* in this Act"—which must include Sections 7 and 32—"shall be construed or held to affect the rights of the States * * * to levy and collect taxes upon * * * output of mines." 30 U.S.C. 189 (emphasis added). And if, as this Court has held, the states are authorized "to levy and collect taxes as though the government were not concerned" (*Mid-Northern Oil Co.* v. *Montana, supra*, 268 U.S. at 49), it necessarily follows that the particular manner in which the federal government collects payments from its lessees and then shares them with the states has no more bearing upon the validity of the state tax than does the manner in which a private lessor collects and spends his proceeds.[9]

II

THE MONTANA COAL SEVERANCE TAX IS NOT PREEMPTED BY THE FEDERAL POLICY FAVORING THE USE OF COAL

Appellants argue (Br. 35-46) that, as applied to both federally and nonfederally owned coal, the Montana Coal

---

[9] Different considerations are raised in the application of the tax to coal owned by Indian tribes in Montana. As we have pointed out in our brief in *Merrion* v. *Jicarilla Apache Tribe* and *Amoco Production Co. and Marathon Oil Co.* v. *Jicarilla Apache Tribe* (Nos. 80-11 and 80-15), at 22-23 n.16, and as amicus Crow Tribe of Indians points out in its brief in this case, the Indian Mineral Leasing Act of 1938 (ch. 198, 52 Stat. 347, 25 U.S.C. 396a-396g) does not contain an express authorization of state taxation similar to that in Section 32 of the Mineral Lands Leasing Act. Moreover, the legislative history of the 1938 Act, unlike that of the 1920 Act and amendments thereto, reflects an intent to maximize the return from the leasing of Indian lands. S. Rep. No. 985, 75th Cong., 1st Sess. 2-3 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1-3 (1938). Finally, this Court has made clear that the standards of preemption applicable to federal laws regulating Indian affairs are different from those that have been applied in other areas. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980), slip op. 6-7. The validity of the Montana tax as applied to mining of coal owned by the Crow Tribe is in issue in *Crow Tribe of Indians* v. *State of Montana*, No. 79-4321 (9th Cir., argued on Jan. 14, 1980), which has been argued and is under submission to the court of appeals. We have appeared *amicus curiae* in support of the Tribe in that case.

Severance Tax "[s]ubstantially [f]rustrates" national policy favoring the use of coal. But, of course, only so far as that "policy" is translated into congressional legislation can it have the effect of preempting state laws under the Supremacy Clause. Statements and reports by Executive Branch officials (see Br. 36 & n.**), have no independent preemptive force. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952).

Appellants do observe (Br. 36 n.**), correctly, that Section 2(6) of the Energy Policy and Conservation Act of 1975 (Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. 6201(6)) declares it to be one of the purposes of that Act "to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources." Appellants are also correct (Br. 37, 44 n.*) that Section 102(b)(3) of the Powerplant and Industrial Fuel Use Act (PIFUA) of 1978 (Pub. L. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III) 8301(b)(3)) recites a like objective "to encourage and foster the greater use of coal and other alternative fuels, in lieu of natural gas and petroleum, as a primary energy source." But surely these general statements, standing alone, cannot be thought to have preempted all state legislation that may have an adverse impact on the use of coal. Like preambles to statutes, such declarations ordinarily "do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the opinion of that body existed and justified the expression of its will" in other portions of the legislation. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 290 (1936).[10] It is

---

[10] See also *Yazoo & Mississippi Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); *Ass'n of American Railroads* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Bissette* v. *Colonial Mortgage Co.*, 477 F.2d. 1245, 1246 n.2 (D.C. Cir. 1973); *Lehigh & New England Ry.* v. *ICC*, 540 F.2d 71, 79 (3d Cir. 1976), cert. denied, 429 U.S. 1061 (1977); *Hughes Tool Co.* v. *Meier*, 486 F.2d 593, 596 (10th Cir. 1973); 1A C. Sands, *Sutherland Statutes and Statutory Construction*, §§ 20.02, 20.09 (4th ed. 1972); cf. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 201-203 (1962); *Lauf* v. *E. G. Shinner &*

therefore necessary to look beyond such general expressions of "national policy" to specific provisions of federal statutes with which the state law is said to conflict. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133-134 (1978).[11] The only specific statutory provisions favoring the use of coal cited by appellants are those in PIFUA.

PIFUA prohibits any new electric powerplant or new major fuel-burning installation (MFBI) consisting of a boiler from using natural gas or petroleum as a primary energy source. 42 U.S.C. (Supp. III) 8311(1), 8312(a). The Act also prohibits all existing electric powerplants from using natural gas as a primary energy source after January 1, 1990, and gives the Secretary of Energy discretionary authority to prohibit existing powerplants from burning natural gas or oil if he determines (1) that the plants are technically and financially capable of using coal or another alternate fuel as a primary energy source and (2) that such substitution of fuels will not require substantial physical modification of the facility or cause a substantial decrease in the facility's capacity. 42 U.S.C. (Supp. III) 8341-8343. Because PIFUA, where it applies, *mandates* the use of coal, we do not believe that an increase in the price of coal occasioned by the severance tax can be said to "stand[]

Co., 303 U.S. 323, 330 (1938). As this Court stated in another context, "legislative intention, without more, is not legislation." *Train* v. *City of New York*, 420 U.S. 35, 45 (1975).

[11] In *Exxon Corp.*, the Court rejected an analogous argument that the "basic national policy favoring free competition" reflected in the Sherman Act preempted a state statute governing the retail distribution of gasoline. Contrary to appellants' suggestion (Br. 44 n.*), this aspect of the holding was not dependent on a *factual determination* that the Maryland statute did not substantially frustrate that "policy." Rather, the Court held that the broad policy did not have a preemptive force, irrespective of whatever factual showing might have been made about the state law's anticompetitive effect. Elsewhere in the opinion the Court considered the more focused allegations of conflict with specific provisions of the Robinson-Patman Act. 437 U.S. at 129-133.

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" merely because it may make conversion to coal more expensive. See Br. 42, quoting *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1974). Appellant utilities, for example, continue to burn coal; they have not substituted oil or natural gas.

There are, to be sure, a number of temporary and permanent exemptions from PIFUA's requirements. 42 U.S.C. (Supp. III) 8321-8322, 8341-8352. See Comment, *The Powerplant and Industrial Fuel Use Act of 1978: Fuel Replacement*, 3 Harv. Envt'l L. Rev. 214, 229 (1979). Temporary and permanent exemptions are available to both existing and new electric powerplants and MFBI's if the Secretary determines that an adequate and reliable supply of coal or other alternate fuel is available only at a cost substantially exceeding the cost of petroleum. 42 U.S.C. (Supp. III) 8321(a)(1), 8321(e)(2)(A), 8322(a)(1)(A), 8351(a)(1), 8351(h)(2)(A), 8352(a)(1)(A). Moreover, the Secretary's authority to mandate fuel replacement for existing powerplants and MFBI's is limited, because he must first determine that "it is financially feasible to use coal or another alternate fuel as a primary energy source * * *." 42 U.S.C. (Supp. III) 8341(b)(3) and 8342(a)(3). Because of these exceptions that take cost into account in certain respects, it is conceivable that an increase in the price of coal occasioned by severance taxes imposed by Montana or other states might result in excusing a powerplant or MFBI from using coal.[12] But the Act does not regulate or prohibit price increases imposed by coal producers

---

[12] As the Montana Supreme Court observed, however (J.S. App. 23a-24a), because of high transportation charges, the severance tax—although imposed at a rate of 30% of market value in Montana—constitutes a far smaller percentage of the value of the coal when delivered to an out-of-state utility. The portion of the ultimate cost of electricity to the consumer that is attributable to the Montana tax is estimated by Montana officials to be even lower, amounting to no more than 2% (Table II) of a customer's electricity bill. See *Hearings*, note 1, *supra*, at 38.

themselves, which could have a similar effect; we therefore cannot find in these provisions that expressly *accommodate* price increases an implicit congressional intent to prohibit those particular increases that are caused by severance taxes.[13] Much less, can we discern in the Act a standard for determining a particular amount which such taxes may not exceed.[14]

Whatever the potential for the Montana tax to slow the increase in the use of coal by powerplants and

---

[13] The statute reveals in other respects a congressional reluctance to override state and local laws even though they might discourage utilization of coal. Temporary and permanent exemptions are available for new and existing powerplants and MFBIs if "the prohibitions * * * could not be satisfied without violating applicable environmental requirements." 42 U.S.C. (Supp. III) 8321(a)(3), 8322(a)(1)(C), 8351(a)(3), 8352(a)(1)(C). The term "applicable environmental requirements" is defined to include requirements of state law. 42 U.S.C. (Supp. III) § 8302(a)(17)(A). In addition, the statute provides for permanent exemptions in certain circumstances if the Secretary determines that operation of the facility would be infeasible because of state and local requirements. 42 U.S.C. (Supp. III) 8322(b), 8352(b). See H.R. Conf. Rep. No. 95-1749, 95th Cong., 2d Sess. 76-77 (1978).

[14] This is in sharp contrast to state tax measures which intrude into pervasive federal control of the distribution and price of natural gas, such as Louisiana's "first use" tax, at issue in *Maryland* v. *Lousiana*, No. 83 Original (argued Jan. 19, 1981). See also, *New England Power Co.* v. *New Hampshire Public Utilities Comm'n*, No. 80-1208 (pending on appeal).

In the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3352, which was enacted together with PIFUA, Congress imposed controls on the wellhead price of natural gas. 15 U.S.C. (Supp. III) 3311-3320. However, in Section 110(a)(1) of the Act, 15 U.S.C. (Supp. III) 3320(a)(1), Congress provided that the price for the first sale of natural gas may exceed the maximum lawful price where necessary to recover "State severance taxes attributable to the production of such natural gas and borne by the seller," although any such tax enacted after December 1, 1977, must treat natural gas destined for interstate commerce and that destined for intrastate sale alike. Thus, even where Congress has sought to regulate the price of natural resources, it likewise has accommodated, not prohibited, state severance taxes.

MBFIs, however, we believe it is clear from the face of the Act that Congress did not intend PIFUA to preempt the Montana tax. Section 601(a)(1) of PIFUA, 42 U.S.C. (Supp. III) 8401(a)(1), provides for the furnishing of financial assistance to those areas of a state that are adversely affected by increased coal or uranium mining if the governor of the state finds that increases in employment have required or will require substantial increases in housing or public facilities and services and that the state or local government lacks the financial and other resources to satisfy those needs within a reasonable time. Section 601(a)(2) then provides that

> increased revenues, *including severance tax revenues*, royalties, and similar fees to the State and local governments which are associated with the increase in coal or uranium development activities and which are not prohibited from being used under provisions of law in effect on the date of the enactment of the Act shall be taken into account in determining if a State or local government lacks financial resources.

42 U.S.C. (Supp. III) 8401(a)(2) (emphasis added). On its face, this Section contemplates the continued existence, not preemption, of state severance taxes on coal.

Appellants may argue that Section 601(a)(2) does not demonstrate a congressional intent to tolerate state severance taxes of *any* amount, no matter how disruptive of the coal conversion program. But at least as regards the particular tax in suit, that argument is difficult to square with the notoriety of the Montana tax, enacted only a few years earlier and the subject of continuing controversy. Moreover, as it happens, the legislative history of Section 601(a)(2) reveals that it was framed with Montana's tax specifically in mind.

The PIFUA bill that passed the Senate contained an impact aid section, but the House bill did not. H.R. Conf. Rep. No. 95-1749, 95th Cong., 2d Sess. 93 (1978). The transcript of the meetings of the Joint Conference on Energy reveals that the Senate's impact aid section met

with resistance on the part of the House conferees, who believed that the states would be able to satisfy the demand for facilities and services occasioned by increased coal production through imposition of severance taxes and, in the western states, through their share of royalties received under the Mineral Lands Leasing Act from the extraction of federally owned coal. See Transcript of the Joint Conference on Energy, at 1822, 1824, 1832, 1834-1837, 1839 (Nov. 9, 1977), reprinted in U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act*, Vol. II, 777, 779, 787, 789-792, 794 (1978). Representative Eckhardt noted that the western states receive a share of royalties under the Mineral Lands Leasing Act, increased in 1976, for impacted areas of the states and that

> * * * in addition to that, the western states may collect severance taxes on that coal.
>
> As I pointed out [see Tr. 1822; *Legislative History* at 777], Montana already collects $3 a ton on severance taxes on coal and still enjoys a 50 percent royalty return. As the price of coal goes up, just as the price of oil went up, those severance taxes in addition go up.
>
> This is a percentage tax, not a flat tax in most instances.
>
> If we are going to merely determine on the basis of impact on a particular community in a state how much money is going to go to that community, without taking into account how much that community is enriched, I think that we are going to have people who are so angry at us in Congress * * *.

Tr. 1835; *Legislative History* at 790. Section 601(a)(2), which provides that severance taxes and royalties shall be "taken into account" in distributing impact aid, obviously was drafted to meet the objections of Representative Eckhardt and other conferees. The understanding of the conferees therefore underscores what seems evident from the face of Section 601(a)(2)—that Montana's severance tax is not preempted by PIFUA. Because PIFUA is the only statute seriously relied upon by appellants

as setting forth a preemptive policy favoring the use of coal, appellants' preemption argument must fail.[15]

III

THE MONTANA COAL SEVERANCE TAX IS NOT UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE

Appellants argue, finally, that the Montana Coal Severance Tax is invalid under the Interstate Commerce Clause. They contend (Br. 17-26) that the Montana Supreme Court erred in concluding (J.S. App. 8a-18a) that the tax does not violate the Commerce Clause because, under this Court's decision in *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922), the severance of coal is a taxable event that precedes entry of the coal into interstate commerce. Instead, it is argued (Br. 27-34), the severance tax should be scrutinized under the four-part test this Court articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)—whether the tax

---

[15] Appellants also contend (Br. 37-41) that the Montana tax is preempted by the Clean Air Act, 42 U.S.C. (& Supp. III) 7401 *et seq.* But the Clean Air Act does not mandate the use of coal; it merely establishes standards for the emission of sulfur dioxide when coal is used. Any affect those standards might have on the market for high and low sulfur coal is incidental and not a matter of affirmative congressional intent. Indeed, when it amended the Act in 1977 (see Pub. L. No. 95-190, Section 14(a)(7)-(9), 91 Stat. 1399, amending Section 111 of the Clean Air Act, 42 U.S.C. (Supp. III) 7411), Congress made clear its intent to *remove* any special incentives previously created by the Act to prefer low sulfur coal mined in the west. See, *e.g.*, H.R. Rep. No. 95-299, 95th Cong., 1st Sess. 166 (1977); see also Pub. L. No. 95-95, Section 120(a), 91 Stat. 720, 42 U.S.C. (Supp. III) 7421. Accordingly, in promulgating new source performance standards (40 C.F.R. 60.40(a)-60.49a(a)), EPA has taken into account the economic impact the standards might have on regional coal markets and has followed the congressional intent not to discourage the use of high sulfur coal. See, *e.g.*, 43 Fed. Reg. 42160 (1978); 44 Fed. Reg. 33583, 33596 (1979); 45 Fed. Reg. 8213 (1980). We would be reluctant in any event to ascribe to Congress an intent implicitly to divest Montana of the power to impose a tax on its coal while, under appellants' argument, an eastern state would remain free to impose the very same tax on its high sulfur coal.

"is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Appellants do not dispute that the first two prongs of the *Complete Auto* test are satisfied. As the Montana Supreme Court observed, "there can be no argument here that a substantial, in fact, the only nexus of the severance of coal is established in Montana" (J.S. App. 20a). Nor can there be any question of apportionment or potential for multiple taxation, for again, as the state court observed, "the severance can occur in no other state" and "no other state can tax the severance" (*ibid.*). See also *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, No. 79-509 (June 10, 1980), slip op. 19-20 n.12. Appellants do argue, however, that the tax discriminates against interstate commerce because over 90% of the coal mined in Montana is shipped out of state and, consequently, out-of-state customers bear most of the burden of the tax. They also argue that the tax is not "fairly related" to the services coal producing companies receive from the State of Montana.

These arguments are not without force in a time of scarce energy resources, particularly in view of the uneven distribution of those resources among the states. And, at least on first impression, the rivalry among the states appellants portray does seem to be of the kind that the Commerce Clause was intended to prevent. See, *e.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 532-535 (1949). In the end, however, we conclude that appellants' arguments should be rejected.

1. As an initial matter, we agree with appellants (Br. 17-26) that Montana's severance tax is not altogether immune from Commerce Clause scrutiny on the theory that mining is a purely "local" activity. Wholly intrastate activities are subject to the reach of Congress' authority under the Commerce Clause where those activities affect interstate commerce, see, *e.g.*, *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232,

241 (1980); *Wickard* v. *Filburn*, 317 U.S. 111, 124 (1942), and we see no reason why, in appropriate cases, the "negative implication" of the Commerce Clause cannot likewise reach activities formerly regarded as peculiarly "local" in nature. See *Lewis* v. *B T Investment Managers, Inc.*, No. 79-45 (June 9, 1980), slip op. 8-11; *Hughes* v. *Oklahoma*, *supra*, 441 U.S. at 326 n.2; *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622-623 (1978). Accordingly, we agree that the *reasoning* in *Heisler* and its progeny has been eroded.

It does not follow, however, that *Heisler* itself was wrongly decided or that the deference owed to a state's compelling interest in taxing mining activities within its borders, which underlay the *Heisler* decision (260 U.S. at 258-259), is entitled to any less weight if the formalistic and categorical approach of the *Heisler* decision is abandoned. In the present case, for example, the *entire value* of the resource, before transportation, originates in Montana, and the mining of coal depletes the resource base and wealth of the State, thereby diminishing a source of taxes and economic activity in the future. Indeed, in many respects, a severance tax is akin to a real property tax, which it has never been doubted is a legitimate means of raising revenue by a situs state—quite apart from the distinct right of that or other states to tax income derived from the use of property or production of natural resources. See, *e.g.*, *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 19-20 n.12.

2. Appellants argue (Br. 33-34), however, that because most coal mined in Montana is shipped out of state, the effect of the tax is to shift the tax burden to consumers in other states and, thereby, to discriminate against interstate commerce. But the Montana tax is computed at the same rate whether the coal is destined for consumption inside or outside the state, and appellants do not argue that this even-handed approach is not followed in practice. We are, therefore, not presented here with the type of unequal treatment of goods shipped into or out of the state, or of persons residing in other states, that the Court has found in other cases to be

"discriminatory" for Commerce Clause purposes. See, *e.g.*, *Lewis* v. *B T Investment Managers, Inc.*, *supra*; *Hughes* v. *Oklahoma*, *supra*; *Philadelphia* v. *New Jersey*, *supra*.

The premise of the Court's prior discrimination cases is that the Framers intended, through the Commerce Clause, to create a "national common market" (*Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)) and "an area of free trade among the several States" (*McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). Under such a regime, the borders between states are essentially irrelevant. See, *e.g.*, *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331-332 (1977); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). It would therefore constitute a considerable departure from the rationale of prior discrimination cases to hold the facially neutral Montana tax invalid solely by attaching significance to the fact that most coal mined in Montana crosses the very state borders that ordinarily are to be regarded as irrelevant.

Further, the argument that a tax is discriminatory because its burden is borne primarily by consumers in other states is precisely that advanced by the *amici* states in *Heisler*. There it was argued that Pennsylvania had a virtual monopoly on anthracite coal and that, because 80% of the coal was shipped out of state, the tax discriminated against and impermissibly burdened interstate commerce. 260 U.S. at 251-253; see also *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172, 177-179 (1923). The Court was singularly unimpressed with these factors, terming them "adventitious considerations." 260 U.S. at 259. Although we believe that the basis of the Court's rejection of these arguments in *Heisler*—that mining is not interstate commerce—should not be followed, the Court's evident misgivings about judging the validity of a state tax by assessing the state's "monopoly" position or the "exportation" of the burden out of state are equally valid today.

The threshold questions whether the state in fact has a "monopoly" position and whether the burden of the

levy is shifted forward principally to out-of-state consumers, rather than borne by in-state producers or others, would themselves entail a complex factual inquiry, including a consideration of alternate sources of supply for the product and the elasticity of demand. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat'l Tax J. 245, 248-249 (1978); R. Posner, *Economic Analysis of Law* 367, 510-514 (2d ed. 1977); *Developments in the Law, Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 968-970 (1962). But even if the "formidable evidentiary difficulties" did not "make the Court's inquiry futile" (*Developments, supra*, 75 Harv. L. Rev. at 970; see also Hellerstein, *supra*, 31 Nat'l Tax J. at 249), it is not apparent that the Commerce Clause was intended to impose this additional condition on the constitutionality of facially non-discriminatory taxes. Nor is it apparent that the Clause was intended to infuse principles of antitrust law into relations between the states by reference to such vague standards as whether one state is "exploiting" a "monopoly" of a natural resource or other commodity where the flow of commerce among them is not otherwise impeded.[16]

It should be noted, finally, that appellants' argument that the tax discriminates against interstate commerce because its burden is "exported" to out-of-state is not

---

[16] Indeed, at bottom, appellants' argument that Montana may not exploit its "monopoly" position by exporting a tax burden to out-of-state customers is not that the Commerce Clause *shields* them from discriminatory treatment, for there is no true discrimination present in this case. Rather, it is that the Commerce Clause operates as a *sword* to give persons residing in one state a right of access at reasonable rates to natural resources located in another state that has a wealth of such resources, irrespective of whether or on what terms the residents of the resource-rich state have access to the resources. See *Developments, supra*, at 970; Hellerstein, *supra*, 31 Nat'l Tax J. at 250-251. Cf. *Reeves, Inc.* v. *Stake*, No. 79-677 (June 19, 1980), slip op. 14-15. We doubt that the Commerce Clause, of its own force, was intended to allow one state, or its residents, to control the terms of resource development and depletion in a sister state in this fashion. Cf. *Philadelphia* v. *New Jersey, supra*, 437 U.S. at 626.

logically dependent on the *amount* of the tax. In *Heisler*, for example, the claim was that *no* special severance tax could be imposed on coal primarily destined for interstate commerce. But the Court has since made clear that even interstate commerce must pay its way. *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250-254 (1938). Accordingly, it must be conceded, as appellants have done, that Montana may impose *some* severance tax on the mining of coal. See Hellerstein, *supra*, 31 Nat'l Tax J. at 249. Appellants therefore apparently ask the court to adopt a new and more complex test of discrimination: a state's severance tax that is borne by out-of-state consumers may not substantially exceed the amount necessary to recoup the state's costs associated with the mining. *Ibid.*, cited at Br. 33. But this is merely a variant of appellants' argument that the Montana tax is not fairly related to the services provided by the State. It is to this argument that we now turn.

3. Appellants contend (Br. 29-33; Comp. ¶ 26, J.S. App. 55a) that the Montana tax is not "fairly related to the benefits and services provided by the State" within the meaning of the fourth prong of the *Complete Auto* test and that they were entitled to a trial on the issue. They assert (Br. 12) that they expected to show at trial that the "legitimate local impact" costs of coal mining—additional schools, roads, and police, fire, health, and environmental protection—might amount to 2¢ per ton, as compared to average revenue of over $2 per ton realized under the severance tax.[17] Because of this alleged disparity, appellants argue that the Montana legislature "grossly overreached" in imposing a tax at a rate of up to 30% (Br. 31). In our view, however, appellants misapprehend the nature of the "fairly related" prong of the *Complete Auto* test.

---

[17] If the "legitimate local impact" costs of mining (which appellants contend must be the measure of the state's severance tax) amount to only 2¢ per ton of coal taken, it is not clear how appellants could concede in the Montana Supreme Court that a severance tax at a rate of between 12½ and 15% would not violate the Commerce Clause. See J.S. App. 9a.

Contrary to appellants' apparent suggestion, the Court did not state or even intimate in *Complete Auto* that the *amount* of a state tax having some impact on interstate commerce must itself be fairly related or roughly equivalent to the *value* of the services provided by the state; the words "amount" and "value" were not even used. 430 U.S. at 279.[18] And, at least in the context of the present case, a rule requiring an equivalence between benefits and burdens would constitute a radical departure from the Court's traditional view of a state's taxing power:

> Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937); see also *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 373 (1974).

We do not believe that the latitude afforded the states under the Due Process Clause of the Fourteenth Amendment to decline to assess taxes on the basis of the benefits conferred is implicitly divested by the Commerce Clause merely because the person or activity taxed has a nexus to interstate commerce. And we do not read the "fairly related" language in *Complete Auto* to accomplish this extraordinary result. As this Court has observed, " '[i]t

---

[18] See also *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 19; *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 444-445 (1979); *Washington Revenue Dep't* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Nat'l Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 558 (1977).

was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.'" *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 108 (1975), quoting *Western Livestock* v. *Bureau of Revenue*, *supra*, 303 U.S. at 254. In our view, where, as here, the state tax does not discriminate against interstate commerce and is fairly apportioned to activities occurring within the state, the "just share of state tax burden" for those engaged in interstate commerce is essentially a matter for the legislature of the state to determine in "pursu[ing] its own fiscal policies" (*Colonial Pipeline Co.* v. *Traigle*, *supra*, 421 U.S. at 108 n.6, quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1970). As the Court stated in *Traigle* (421 U.S. at 108-109, quoting *General Motors Corp.* v. *Washington*, 377 U.S. 436, 440-441 (1964)):

> [T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant[s'] activities within the State and to appellant[s'] consequent enjoyment of the opportunities and protections which the State has afforded. * * * As was said in *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'

The fourth prong of the *Complete Auto* test—whether the tax is "fairly related to the services furnished by the State"—is derived from *General Motors*, *J. C. Penney*, and similar cases. See 430 U.S. at 279 n.8; see also *Nat'l Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 558 (1977). In practical effect, it is an elaboration upon the first prong of the *Complete Auto* test. See, *e.g.*, *Budget Rent-A-Car of Washington* v. *Multnomah County*, 597 P.2d 1232, 1239 n.6 (1979).

Under the first prong, the interstate business must satisfy a threshold test of some minimum contact—a substantial nexus—with the state. *Nat'l Bellas Hess, Inc.* v. *Illinois Revenue Dep't*, 386 U.S. 753 (1967). If that threshold test is satisfied, the fourth prong requires only that the tax be related in some fashion to the extent of the contact, for it is the activities or presence in the state that may properly be made to bear a "just share of state tax burden."

For example, in *Nat'l Geographic Society* v. *California Board of Equalization, supra*, the Court sustained against challenges under the Due Process and Commerce Clauses the imposition of use-tax-collection liability on the Society for its mail order business within the state. The presence of two officers within the state and the solicitation there of $1 million annually for advertising furnished a sufficient nexus to render constitutional the Society's tax liability, as measured by the volume of mail order sales in California. See also *Standard Pressed Steel Co.* v. *Washington Revenue Dep't*, 419 U.S. 560 (1975).

The Montana Coal Severance Tax stands on far stronger ground. The "operating incidence" of the tax (*General Motors Corp.* v. *Washington, supra*, 377 U.S. at 440-441) is the severance of coal within Montana. The tax, measured as a percentage of the value of the coal taken, plainly is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. *Id.* at 441.[19] Compare *Nippert* v. *Richmond*, 327 U.S. 416, 427 (1946); *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 82 (1938). When the tax is levied in proportion to the taxpayer's activities or presence in the state, the taxpayer is shouldering his fair

---

[19] As the Court stated in *Wisconsin* v. *J. C. Penney Co., supra*, "the *incidence* of the tax as well its *measure* [must be] tied to the earnings which the State * * * has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes." 311 U.S. at 446 (emphasis added).

burden of supporting that state's police and fire protection and other "advantages of a civilized society." *Exxon Corp.* v. *Wisconsin Dep't of Revenue, supra,* slip op. 19, quoting *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 445 (1979); see also *Washington Revenue Dep't* v. *Ass'n of Washington Stevedoring Cos., supra,* 435 U.S. at 764 (Powell, J., concurring).[20]

This is not to suggest that the "fairly related" test is an empty one. In many cases, particularly those involving a tax on an aspect of interstate transportation, that test will furnish a useful supplement to the inquiry whether the tax is fairly *apportioned* to that portion of interstate activities taking place in the state. For when the measure of a state tax is out of all proportion to the activities occurring within the state, the Court may properly conclude that the state is seizing upon the occasion of a relatively minor contact with the state to impose an undue burden on interstate commerce, not merely requiring a company engaged in interstate commerce to bear its "just share of state tax burden." See, *e.g.*, our Complaint in intervention (at 3) in *Maryland* v. *Louisiana,* No. 83 Orig. (argued Jan. 19, 1981).[21] But

---

[20] Thus, the reference in the cases to police and fire protection and benefits of a civilized society is not, as appellants suggest (Br. 30), a disingenuous incantation designed to avoid a more searching analysis of whether the value of the benefits the taxpayer actually receives is in fact roughly equivalent to the amount of taxes he pays. If the tax is related to the taxpayer's activities or presence in the state (for which it receives some benefit, *e.g.*, the substantial privilege of mining coal), the taxpayer will realize, in proper proportion to the taxes it pays, "[t]he only benefit to which [it] is constitutionally entitled * * * [—] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Carmichael* v. *Southern Coal & Coke Co., supra,* 301 U.S. at 522.

[21] This, and the Framers' special concern with the question of tolls imposed by states in a position to obstruct the interstate movement of goods and persons (see *Developments, supra,* 75 Harv. L. Rev. at 969-970), may explain the Court's closer scrutiny of "user" fees and comparable charges imposed for the purpose of maintaining facilities used in interstate transportation. See *Evans-*

whatever the result in other contexts, we believe that the Montana Coal Severance Tax, measured by the value of coal taken, is in proper proportion to the activities of the appellant coal producers in the State and is, as a consequence, "fairly related to the services provided by the State" within the meaning of the fourth prong of the *Complete Auto* test.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

EDWARD J. SHAWAKER
CHRISTOPHER KIRK HARRIS
RICHARD J. LAZARUS
Attorneys

FEBRUARY 1981

---

ville Airport v. *Delta Airlines*, 405 U.S. 707 (1972), and other cases cited by appellants (Br. 32). Moreover, in such cases, the nexus of the goods or passengers to the taxing state is more transitory than that of appellants in the present case such that it might be unfair to burden them unduly with support of the "civilized society" in the state generally.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 338592 269

No. 80-581

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

FEB 25 1981
ALEXANDER L. STEVAS,
CLERK

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc., and Western Energy Company,

Appellants,

against

State of Montana, Ted Schwinden, Governor of Montana, Helen J. Feaver, Director of the State Department of Revenue, and Maurice L. Brusett, Director of Administration and State Treasurer,

Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF OF THE WESTERN CONFERENCE OF THE COUNCIL OF STATE GOVERNMENTS AMICUS CURIAE

Of Counsel:
PATRICIA B. SPRAGUE
165 Post Street,
Fifth Floor
San Francisco, CA 94108
(415) 986-3760

JOHN E. THORSON
Western Regional Counsel
Council of State
Governments
165 Post Street,
Fifth Floor
San Francisco, CA 94108
(415) 986-3760
Counsel of Record

Attorneys for the Amicus Curiae

February, 1981

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

TABLE OF CONTENTS

	Page
Summary of the argument	2
Argument	3
I	
The commerce clause does not nullify a severance tax imposed by a sovereign state	3
A. The act of severance is an inherently local activity unrelated to the ultimate destination of the natural resource in the stream of commerce	4
B. On its face, a severance tax such as Montana's satisfies the important concerns of commerce clause inquiry	6
1. The taxed activity has an inherent nexus with the taxing state	6
2. The severance tax is fairly apportioned	7
3. The severance tax is nondiscriminatory	7
4. The tax is rationally related to the services rendered the taxpayer	12
II	
The Montana severance tax has not been preempted by federal law	13
A. There has been no explicit preemption of the Montana severance tax by federal statutes	13
B. The Montana severance tax does not frustrate federal law	14
C. Federal policies are not single-purpose; indeed, there are multiple policies concerning energy development, energy conservation, environmental protection, land reclamation, and other purposes	15

TABLE OF CONTENTS

Page

III

The court should exercise judicial restraint in this case 18

A. As a general principle, the court should defer to the political branches of government for the resolution of disputes concerning issues of federalism 18

B. Were the commerce clause to apply to states' severance taxes, such inquiry would bring upon the judiciary a complex task of unmanageable and immense proportions 22

1. The difficulty of developing an appropriate standard 22

2. The difficulty of evaluating evidentiary matters 23

3. The difficulty of formulating an equitable remedy 24

IV

Application of the commerce clause to severance taxes of states is prevented by sound principles of federalism and the Tenth Amendment 26

A. Judicial invalidation of a nondiscriminatory state tax on a uniquely local activity, in this instance, the act of severance, would undermine fundamental characteristics of our federal system 26

B. Nullification of the Montana coal severance tax would violate the Tenth Amendment 28

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases

Page

Alaska v. Artic Maid, 366 U.S. 199 (1961) 5, 11

Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979) 13

Baldwin v. Fish & Game, 436 U.S. 371 (1978) 8, 9

Baldwin v. Seelig, 294 U.S. 511 (1935) 8

Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) 5

Commonwealth Edison Co. v. State of Montana, 615 P.2d 847 (Mont. 1980) 12, 19

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 6, 7, 12

Coyle v. Oklahoma, 221 U.S. 559 (1911) 30

Dean Milk v. Madison, 340 U.S. 349 (1951) 8

Exxon v. Maryland, 437 U.S. 117 (1978) 12

Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922) 4

H. P. Hood and Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 3

Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) 5

Hughes v. Oklahoma, 441 U.S. 322 (1979) 8

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) 14

Maryland v. Wirtz, 392 U.S. 183 (1968) 29

Massachusetts v. Mellon, 262 U.S. 447 (1923) 20

Minnesota v. Cloverleaf Creamery Co., ... U.S. ...., 49 U.S.L.W. 9111 (1981) 10, 11

Table of Authorities Cited

Cases

Page

Mobil Oil v. Dubno, 492 F.2d 1004 (1980) 13

National League of Cities v. Usery, 426 U.S. 833 (1976) 28, 29, 30

Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) 4, 5

Parker v. Brown, 317 U.S. 341 (1943) 9

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 9

Pike v. Bruce Church, 397 U.S. 137 (1970) 8

Post Oak Oil Co. v. Oklahoma Tax Comm'n, 575 P.2d 964 (Okla. 1978) 4

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 19

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)..13, 15

Toomer v. Witsell, 334 U.S. 385 (1947) 5, 8

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) 9

Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938) 7

Wickard v. Filburn, 317 U.S. 111 (1942) 6

Constitution

United States Constitution:

Tenth Amendment 3, 26, 28, 29

Article I, Section 8 4

Statutes

Clean Air Act, 42 U.S.C. section 7402 13

Mineral Lands Leasing Act of 1920, 30 U.S.C. § 189 (1976) 14

Table of Authorities Cited

Statutes

	Page
Mont. Code Ann. § 15-35-102(d) (1979)	16
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. (Supp. II 1976)	16

Other Authorities

J. Choper, "The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review," 86 Yale L.J. 1552 et seq. (1977) 18, 19

Article by R. Clawson, Billings Gazette (Jan. 1980) 17

The Federalist No. 33, at 204 (Mentor Book Ed. 1961) (A. Hamilton) 18, 26, 27

The Library of Congress Congressional Research Service, Energy: Limiting the Coal Severance Taxes (Issue Brief Number IB 80060, June 24, 1980) 17

10 Nat. Resources Law, 717, 717-19 (1978) 28

No. 80-581

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

Commonwealth Edison Company, Central Illinois Light Company, Dairyland Power Cooperative, Detroit Edison Company, Interstate Power Company, Lake Superior District Power Company, Lower Colorado River Authority/City of Austin, Minnesota Power & Light Company, Northern States Power Company, Upper Peninsula Generating Company, Wisconsin Power & Light Company, Decker Coal Company, Peabody Coal Company, Westmoreland Resources, Inc., and Western Energy Company,

Appellants,

against

State of Montana, Ted Schwinden, Governor of Montana, Helen J. Feaver, Director of the State Department of Revenue, and Maurice L. Brusett, Director of Administration and State Treasurer,

Appellees.

On Appeal from the Supreme Court of the State of Montana

BRIEF OF THE WESTERN CONFERENCE OF THE COUNCIL OF STATE GOVERNMENTS AMICUS CURIAE

Consent for the filing of this *amicus curiae* brief has been obtained by all the parties to this proceeding, and letters indicating the consent of these parties to the filing of this brief have been filed with the Clerk of the Court.

The Western Conference of the Council of State Governments, which comes before the Court as an *amicus,* is the formal organization of state legislators from the thirteen western states and three Pacific trust territories.[1]

The Western Conference (hereinafter also referred to as "state legislators" or "state officials") comes before the Court in general support of the State of Montana and the arguments made by her attorney general. The Western Conference, however, respectfully wishes to bring to the attention of the Court the arguments contained in this brief for the following specific reasons:

1. State legislators have primary responsibility in their states for the taxation of natural resources. Thus, the Western Conference and its members have obvious interests in the clarification of the federal constitutional law as it pertains to the natural resources of their states—including all non-coal energy minerals and other minerals as well.

2. Members of the Western Conference also share a common concern for the implications a decision of this Court in the instant case might have for *all* types of state taxation including gross receipts taxes, *ad valorem* taxes, income taxes, and special taxes such as transfer fees. For the Western Conference fears that, once a court looks beyond the legal incidence of any such tax to its ultimate economic incidence, all forms of state taxation will be in jeopardy of the same

---

[1]The membership of the Western Conference includes the States of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming; the Territories of American Samoa and Guam; and the Commonwealth of the Northern Mariana Islands.

attack urged by the energy companies and utilities in this case.

Beyond these specific concerns, however, these state officials wish to address the Court on the implications this case has for federalism. By a strained invocation of a vaguely articulated national interest, appellants seek to nullify the responsible attempts of a sovereign state to plan for and meet the problems of its present and its future. These state legislators stress that such an interpretation would accomplish only a fundamental shifting of power away from the states and the people of these states and would thereby destroy the concept of states as laboratories of experimentation.

SUMMARY OF THE ARGUMENT

I. *Commerce Clause.* The Montana coal severance tax is a valid exercise of the state's sovereign power to tax in furtherance of the health and welfare of its citizens. Scrutiny under applicable principles of commerce clause adjudication fully supports this conclusion. The tax applies to an activity which takes place entirely within the State of Montana: the severance of coal from the earth. Under this Court's cases, therefore, this tax presents no justifiable commerce clause issues. Even assuming that the tax does reach the level of commerce cause inquiry, it satisfies that inquiry.

II. *Preemption.* There is no basis for a finding that the Montana coal severance tax has been preempted. The tax was enacted pursuant to the state's police power. Great deference should be given to state regulations which further the health and welfare of its citizens. A preemption challenge to a tax must be given careful scrutiny. None of the statutes cited by the appellants explicitly preempt state action in the field of severance taxation. The Montana tax does not conflict with federal regulations in this field. The

tax at issue is neither explicitly nor implicitly preempted by federal policies.

III. *Desirability of Judicial Abstention.* With knowledge of the Montana severance tax and of the arguments appellants make against it, Congress has not acted to impose a ceiling on the rate of such taxes. This fact alone should demonstrate the complex policy content of the issue and caution the Court to avoid interposing itself in the controversy. Additionally, it would be unmanageable for the judiciary to undertake commerce clause review of such taxes due to the difficulty of developing an appropriate standard, the difficulty of evaluating evidentiary matters, and the difficulty of formulating an equitable remedy.

IV. *Tenth Amendment Considerations.* Judicial invalidation of a state's severance tax, especially in the name of a vaguely articulated national policy, would do fundamental violence to original understandings of federalism. The state power to tax and to spend in pursuit of well-formulated plans to meet the present and future impacts of energy development are integral governmental functions. Rather than being nullified, these planning efforts speak of the potential contemporary viability of states in the federal system and should be honored as such.

ARGUMENT

I

THE COMMERCE CLAUSE DOES NOT NULLIFY A SEVERANCE TAX IMPOSED BY A SOVEREIGN STATE

Since 1975, the sovereign state of Montana has imposed a 30 percent tax on coal severance. Coal producers and utilities are challenging this tax. They are not challenging the state's power to impose the tax; rather, they are challenging the amount of the tax. Appellants' Brief at 49-50.

At issue is the constitutionality of Montana's sovereign taxing power under the commerce clause of the United States Constitution, article I, section 8: "Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

A. The Act of Severance is an Inherently Local Activity Unrelated to the Ultimate Destination of the Natural Resource in the Stream of Commerce

Many cases support the proposition that Montana's taxation of its coal does not rise to the level of commerce clause scrutiny because the activity taxed, the severance of coal, is an activity completely contained within the State of Montana.

While the energy companies in this case have attempted to cast doubt upon the ability of any local activity to be beyond the reaches of the commerce clause, Appellants' Brief at note * *, p. 23, the logic of a severance tax on just such an activity is correct. As one court has indicated,

> The excise tax is on the act of severance, and the production, of an Oklahoma resource. Severance can occur only once and in this state. The levy is prior to entrance of any gas into interstate commerce and is on *all* gas so severed and produced without regard to subsequent entrance into either intra or interstate commerce. (emphasis in original)

Post Oak Oil Co. v. Oklahoma Tax Comm'n, 575 P.2d 964, 967 (Okla. 1978). Thus, the severance tax applies regardless whether the coal fuels generators in Houston, warms homes in New England, is used for rock gardens in Helena, or is simply stored indefinitely 50 feet from the mine mouth.

This Court has long recognized the local character of the severance of coal, other resources, and other parallel activities. The trilogy of older cases by this Court, *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922), *Oliver Iron*

Mining Co. v. Lord, 262 U.S. 172 (1923), and *Hope National Gas Co. v. Hall,* 274 U.S. 284 (1927), bespeak this understanding. Despite appellants' argument that this clarity has tarnished over time, its validity was reaffirmed in *Alaska v. Arctic Maid,* 366 U.S. 199 (1961), a case involving state taxation of a renewable resource activity. In that case, Alaska imposed a license tax upon freezer ships which processed salmon caught in Alaskan territorial waters and then took the frozen salmon to Washington State to sell. The owners of the freezer ships argued that they operated in interstate commerce and that, therefore, Alaska had exceeded its authority in imposing such a tax upon them. This Court responded that the taxable event in question was neither the catching nor the freezing of the fish *per se* but prosecuting the business of freezer ships and other floating cold storages.

In referring to *Toomer v. Witsell,* 334 U.S. 385 (1947), and *Oliver Iron Mining Co. v. Lord* as dispositive, the Court spoke about the incidence of the tax and its relationship to the interstate market:

> Here as there the tax is an occupation tax. Here as there, the market for the product obtained locally is interstate, the taking being a step in the process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each, there is a preliminary local business being conducted—an occupation made up of a series of local activities which the state can constitutionally reach.

Id. at 204.

Montana finds herself in just this same position—forced to defend the assertion of its sovereign taxing power over the severance of coal which takes place entirely within Montana. *Cf. Cities Service Gas Co. v. Peerless Oil & Gas Co.,* 340 U.S. 179 (1950); *Hope Natural Gas Co. v. Hall,* 274 U.S. 284 (1927). Yet, these state legislators are confident that the Court will once again reaffirm the local

nature of severance and thereby demonstrate comity to the states of this Nation in their legitimate exercise of their taxing powers.

B. On its Face, a Severance Tax Such as Montana's Satisfies the Important Concerns of Commerce Clause Inquiry

The act of severance is one which can fairly be called intrastate. Even if this Court were to look beyond the taxed activity itself to determine if there was an effect upon interstate commerce, *Wickard v. Filburn,* 317 U.S. 111 (1942), any identified effect would not necessarily be forbidden. The question then would be whether the burden on interstate commerce clearly outweighs the state's legitimate purpose in regulating or taxing the activity.

This Court has provided a four part test to determine whether such an impermissible burden exists. *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) (rejecting the proposition that the interstate commerce is immune from taxation). The elements of the test are: (1) whether the taxed activity has a nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the benefits provided the taxpayer. 430 U.S. at 279.

As the following indicates, the Montana severance tax, on its face, satisfies each of these four criteria. More importantly, a factual inquiry by a court would provide little, if any, additional information to aid in the application of this test. In this case, such inquiry soon leads to legal conclusions; thus, as a matter of law, Montana's severance tax fully satisfies the concerns behind the commerce clause.

1. *The Taxed Activity has an Inherent Nexus with the Taxing State*

The act of severance in and of itself constitutes the appropriate nexus with the taxing state. Severance of a

natural resource can only occur in one location; the Montana tax is applied solely to the coal mined within its state borders. *See Western Livestock v. Bureau of Revenue,* 303 U.S. 250 (1938).

2. *The Severance Tax is Fairly Apportioned*

Related to the question of nexus with the taxing state is the additional concern that the tax be fairly apportioned between activities which take place within the taxing state, subject to tax, and those activities which, because they take place in another state, are beyond the state's taxing power. This second prong of the *Brady* test is satisfied due to the fact that, since severance is an activity which can only take place in Montana, no other state can legitimately tax it.

3. *The Severance Tax is Nondiscriminatory*

The Montana severance tax does not discriminate against interstate commerce in that the State applies this tax even-handedly to all who sever coal regardless of its ultimate destination. Severance of coal for local use is taxed at a maximum of 30 percent as is coal destined for the interstate market. If the fact that more coal leaves the state than remains can justify terming this tax burdensome on interstate commerce, then such would also be the case with various taxes on Washington's timber, Alaska's salmon, California's grapes, New York's stock exchange transactions, Florida's tourist industry, and many other variants of wealth, which due to the climate, geography, or accidents of fortune originate in that particular state and are exported to others.

Over the years, states have pursued many types of policies which, deliberately or not, have impermissably burdened interstate commerce. Many of this Court's cases have given careful consideration to the limits the commerce clause imposes on state legislation; and no single formula has emerged which can be applied to all situations.

One test that has been applied was recently rearticulated in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), quoting the Court's earlier decision in *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970):

> "[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." (Citations omitted)

Id. at 331.

The Montana taxing statute meets these criteria. It regulates evenly and is directly related to legitimate state purposes—funding the costs to the state of the coal mining and the other services necessitated thereby.

A second approach of the Court has been to invalidate state regulations that give preference to local activity over interstate activity or prevent out-of-state business from competing on an equal basis with domestic firms. *See, e.g., Baldwin v. Seelig,* 294 U.S. 511 (1935); *Dean Milk v. Madison,* 340 U.S. 349 (1951); *Pike v. Bruce Church,* 397 U.S. 137 (1970); *Toomer v. Witsell,* 334 U.S. 385 (1947); *Baldwin v. Fish & Game,* 436 U.S. 371 (1978).

The Montana tax is not designed to, nor does it achieve, this prohibited effect. Montana does not prefer its residents over nonresidents, benefit them over out-of-staters, protect them against out-of-state competition, prevent their coal from going wherever there is a willing buyer, or regulate or exempt from regulation business based on its local or interstate character. Thus, the Montana tax does not run

afoul of any of these concerns: out-of-state business is required to do no more than is equally expected of domestic producers of coal.

A third major group of cases concerns challenges to state regulations which attempt to curtail exportation of resources or products. *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *H. P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). Thus, a state cannot isolate itself from the economy of the nation; economic protectionism has been held to be *per se* invalid. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Yet what is found to be protectionist may depend upon the legitimacy of the state objectives in enacting the particular regulation. For example, in *Parker v. Brown*, 317 U.S. 341 (1943), a California state agricultural regulation fixing the price of raisins grown and sold in California and shipped throughout the nation and the world was upheld by the Court. The purpose—to maintain raisin prices by restraining the competition of producers in the sale of their crops—was found to be a legitimate function of the state government; the means by which this purpose was achieved, the raisin marketing program (price regulation), was upheld to be a valid exercise of state power.

The present case is analogous. Montana has a valid state interest in regulating the economic affairs of the state. No one is in a better position than the Montana state government to assess the economic needs and allocate the resources of the state. They have done so in an even-handed, nondiscriminatory manner. In the case at bar, as in *Parker*, a legitimate state objective is being accomplished by nondiscriminatory means—rationally and reasonably related to the ends to be obtained.

Another Montana case involving a state license tax was *Baldwin v. Fish & Game*, 436 U.S. 371 (1978), where in the Montana State elk hunting licensing tax provisions were upheld even though nonresidents were charged $225 to hunt elk compared with a $9 service charge for Montanans.

Despite facial discrimination in favor of locals, the statutory scheme was considered an economic means not unreasonably related to the preservation of a finite resource—a substantial regulatory interest of the state. The Court reasoned that residents pay the cost of the elk hunting program through their taxes; nonresidents should also shoulder their share. Thus, discriminatory regulations have survived constitutional challenge when a legitimate state purpose is reasonably accomplished. It follows that Montana's severance tax scheme, which is not discriminatory on its face and utilizes the revenue for even more important state purposes, fares very well under this line of reasoning.

Similar commerce clause and equal protection challenges were rebuffed by this Court in a case decided earlier this year. *Minnesota v. Cloverleaf Creamery Co.*, ... U.S. ...., 49 U.S.L.W. 9111 (1981). In a reasonable attempt to curtail the wasteful use of petroleum products in the production of plastic containers, the Minnesota Legislature enacted a statute banning the retail sale of milk in plastic, nonreturnable, nonrefundable containers but permitting such sale in other kinds of nonreturnable, nonrefundable containers. The state, perhaps even relying on erroneous information, was balancing, in a manner only a legislature can, the complex trade-offs inherent in any public policy which encourages the use or protection of one resource over another.

The commerce clause question was whether the statute was basically a protectionist measure or whether it be fairly viewed as a law directed to legitimate local concerns with only incidental effects upon interstate commerce? This Court answered:

> Minnesota's statute does not effect "simple protectionism" but "regulates even-handedly" by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the Containers, or the sellers are from outside the State.
>
> * * * * *

> Since the statute does not discriminate between interstate and intrastate commerce, the controlling question is whether the incidental burden imposed on interstate commerce by the Minnesota Act is "clearly excessive in relation to the putative local benefits" *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 142. We conclude that it is not.
>
> • • • • •
>
> In *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), . . . we stressed that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause. (citations omitted)

49 U.S.L.W. at 4115-16.

Appellants have argued that the tax is tailored to fall on interstate commerce. Appellants' Brief at 27. Rather, the tax falls on interstate commerce only to the extent that it is passed along by the appellants to their purchasers and so on to the utility consumers. The State of Montana did not decide where the coal was going or upon whose shoulders the tax would ultimately come to rest; appellants themselves did.

The fact that the coal subsequently enters interstate commerce does not make the tax somehow tailored to fall there. The same argument was made and rejected in *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). The Montana tax is applied evenly regardless of the ultimate destination of the coal: "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, es-

tablish a claim of discrimination against interstate commerce." *Exxon v. Maryland,* 437 U.S. 117, 126 (1978).

4. *The Tax is Rationally Related to the Services Rendered the Taxpayer.*

No taxpayer can expect an accounting from his government as to the equivalence between the taxes he pays and the benefits he receives from the government. Such an accounting is not available both because of economic futility in any attempt to undertake such calculations and because of the nature of government itself. Government exists principally because it provides certain services, often referred to as "public goods," which, by their very nature are not merchantable, cannot be priced, and cannot be sold or exchanged through some market mechanism. These are the benefits of a civilized society and an orderly government, to which the Montana Supreme Court referred, *Commonwealth Edison Co. v. Montana,* 615 P.2d 847, 856-57 (1980), and of which appellants make so light.

Additionally, Montana has and will provide to appellants, their employees, and many of their shareholders the more tangible benefits of schools, health services, parks, transportation, police and fire protection, environmental protection, and the numerous other services provided by contemporary government. Only the Montana Legislature has the constitutional responsibility of undertaking this complex calculus. By its very nature, the decision is a political one; and the judiciary should give great deference to the political outcome that has been achieved.

Thus, the Montana severance tax completely satisfies this, the fourth, criteria set forth in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977).

In summary, appellants are asking that the Montana's well-considered judgment as to its economic plans, needs, and priorities be invalidated. In essence, they push for further erosion of state and local decisionmaking and a concomitant solidification of power at the national level.

For if the power to tax is in some way limited by other authorities, is it not taken away? The commerce clause was not meant to so substantially intrude on the sovereign taxing power of the states.

II

THE MONTANA SEVERANCE TAX HAS NOT BEEN PREEMPTED BY FEDERAL LAW

The commerce clause gives Congress power to regulate what is concededly interstate commerce. Where there has been federal legislation which neither permits nor prohibits state laws in the field, the Court must determine as a matter of law whether the Congressional statutes authorize or forbid the state action.

Preemption of state statutes by federal regulations can occur in a number of ways. Explicit preemption occurs when Congress has declared its intent to be the sole regulator in the field. Preemption also exists where the state and federal regulations conflict. And preemption is found where the intent of Congress to regulate the entire field can be ascertained—sometimes by the pervasiveness of the federal regulations in the particular field. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[2]

A. There Has Been No Explicit Preemption of the Montana Severance Tax by Federal Statutes

There has been no explicit preemption of the Montana coal severance tax by federal statutes; indeed, several statutes speak to the contrary. For example, the Clean Air Act, 42 U.S.C. § 7402, an act cited by appellants, en-

---

[2]Cases in which preemption has been found have shown a clear Congressional intent to preempt state regulations in the legislative history of the Act. *See, e.g., Mobil Oil v. Dubno*, 492 F.2d 1004 (1980) (history of the Emergency Petroleum Allocation Act showed an intent to preempt state regulations); *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979) (—invalidated a New Mexico energy tax on the privilege of generating energy within the state—).

courages cooperative activities by state and local governments. In *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960), the Court held that local regulations were not preempted by the Act; and, in fact, the intent of Congress was to encourage state regulations complementary of the purposes of the Act. What this Court said in *Huron* also speaks well to the issues raised in this case:

> [I]t must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution (citation omitted)" . . . . State regulation based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand. (citations omitted)

362 U.S. at 443.

And, while appellants' attempt to diminish the importance of section 32 of the federal Mineral Lands Leasing Act of 1920, 30 U.S.C. § 189 (1976), it strains comprehension to ignore the clear recognition there afforded the states in exercise of their taxing power.

B. The Montana Severance Tax Does Not Frustrate Federal Law

Appellants have urged that the Montana coal severance tax is preempted by "national policies" with respect to the production and use of coal. In support of their argument, they simply cite numerous federal statutes. Appellants' Brief at note *, p. 5.

Simple enumeration does not necessarily equal pervasiveness; and general recitations of national policy do

not indicate federal preemption of Montana's policy to impose a severance tax.

While the cited federal statutes deal with energy development, conservation, and federal land and mining policy, the Montana regulation of concern here is a state-imposed tax on the severance of coal—an exercise traditionally considered to be part of a state's broad police power. The cornerstone of state government is the power to tax. Therefore, no less than a clear and manifest intent on the part of Congress must be shown in order to preempt the state's taxing function. In referring to the great deference so accorded state police power, this Court has stated, "Congress legislated here in a field which the States have traditionally occupied (citation omitted) . . . so we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Co.*, 331 U.S. at 230. No such clear and manifest statement has been demonstrated so as to lead this Court to nullification of Montana's tax.

C. Federal Policies Are Not Single-Purpose; Indeed, There Are Multiple Policies Concerning Energy Development, Energy Conservation, Environmental Protection, Land Reclamation, and Other Purposes

Maximization of coal production at all costs is not the sole national policy. National policies in this area are not single faceted; they are multipurposed. These laws reflect the need to balance a variety of competing interests. For instance, the federal coal management program attempts to balance energy production goals with a concurrent interest in maintaining social and environmental integrity. Coal burning itself presents many environmental and health hazards. Pertinent laws contain provisions for research and development in these areas—provisions for reclamation and protection of the environment. And, in fact, most all of the Acts cited have some provision for state, local and regional cooperation in these areas.

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (Supp. II 1976), is an example of how one statute can mandate multiple and potentially conflicting goals. Some of the purposes of that statute are to:

> (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
>
> • • • •
>
> (d) assure that surface coal mining operations are so conducted as to protect the environment;
>
> (e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;
>
> (f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and *strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;* . . . . (emphasis added)

30 U.S.C. § 1201.

One of the very things that Montana is trying to accomplish with its taxing policy is to implement complimentary federal as well as state objectives while at the same time to provide for the orderly growth of the coal industry. *See, e.g.,* MONT. CODE ANN. § 15-35-102(d) (1979). Montana has seen the scars left by uncontrolled exploitation of a nonrenewable resource both in their state and in the southeastern United States. The state has attempted legislation which will complement federal policy, insure stable growth for Montana, and avoid the pitfalls of uncontrolled resource exploitation.

While attempting these purposes, Montana's severance tax rate still imposes only about the same or less of a burden on other states than severance tax rates on oil or gas,

from the perspective of the consumer who uses the end product. This is true for two reasons. First, coal in general and western coal in particular is cheaper per BTU than oil or gas. The national average cost per million BTU of coal in December 1979 was $1.95, $3.95 for residential fuel oil and $1.83 for natural gas. And second, while some products of crude oil and natural gas are used in a fairly direct manner, coal is used almost exclusively in power plants to generate electricity. The cost of coal, therefore, in the end product is small as compared to oil and natural gas products. Consequently, the impact of the severance tax is less. The Library of Congress Congressional Research Service, Energy: Limiting the Coal Severance Taxes (Issue Brief Number IB 80060, June 24, 1980).

If the Montana severance tax is preempted by "national energy policies," what about other cost components of coal-generated electricity? Transportation costs far outweigh coal severance tax costs per BTU in the consumer's utility bill. Do Interstate Commerce Commission approved tariffs thereby impermissibly frustrate Congress' will? A dollar's worth of electricity sold to a Minnesota consumer includes a four cent Minnesota sales tax, twice the amount of the severance tax. Article by R. Clawson, Billings Gazette (Jan. 1980). Would the Minnesota sales tax similarly be subject to preemptive challenge?

The Montana coal severance tax has not been explicitly preempted by federal legislation. Congress has not indicated its intent to dominate the field of natural resource severance taxation either implicitly or through a pervasive scheme of tax regulation. Furthermore, the Montana coal severance tax is not only *not* in conflict with federal policies but, in fact, complements and furthers federal policies in many areas by the use to which tax proceeds are put.

Montana attempts only to exercise its sovereign powers to tax and spend. The tax is rationally related to legitimate state public power objectives; and, absent more than a

recitation of general national policies, the Montana coal severance tax should be accorded a strong presumption of constitutionality.[3]

III

THE COURT SHOULD EXERCISE JUDICIAL RESTRAINT IN THIS CASE

A. As a General Principle, the Court Should Defer to the Political Branches of Government for the Resolution of Disputes Concerning Issues of Federalism

A leading proponent of judicial restraint concerning constitutional issues respecting the ultimate power of the national government vis-à-vis the states has argued:

> The functional, borderline question posed by federalism disputes is one of comparative skill and effectiveness of government levels: in a word, an issue of practicability. Whatever the [judiciary's] special competence in adjudicating disputes over individual rights, when the fundamental constitutional issue turns on the relative competence of different levels of government to deal with societal problems, the courts are no more inherently capable of correct judgment than are the companion branches.

J. Choper, "The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review," 86 YALE L.J. 1552, 1556 (1977).[4] Such deference to Congress con-

[3] "But it will not follow from this doctrine (the Supremacy Clause) that acts of the larger society which are *not* pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies (here the States), will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such." THE FEDERALIST NO. 33, at 204 (Mentor Ed. 1961) (A. Hamilton).

[4] Choper would also argue that judicial review would be appropriate "over challenges to state encroachments on national power." "The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review," 86 YALE L.J. 1552, 1577 (1977). His concerns there enumerated, *id.* at 1585-86, are not relevant in the instant case. We have argued generally that taxpayers such as

cerning the validity of the Montana severance tax rate should follow in this case.[5]

Several decisions of this Court suggest the wisdom of judicial restraint when complex issues of political power and sovereignty present themselves before the Court. In these instances, this restraint is justified as a "consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority" and "inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement. . . ." *Rescue Army v. Municipal Court,* 331 U.S. 549, 571 (1947). Thus, in a decision in which the Court was faced with a judicial claim by a state that a Congressional statute had encroached upon its

---

appellants can have an effective political presence in the taxing state. More specifically, as the Montana Supreme Court adequately demonstrated, appellants, vocalizing their interpretation of Congress' national energy policy, have been active in Montana state politics. *Commonwealth Edison Co. v. Montana,* 615 P.2d 847, 857 (Mont. 1980). These same companies have been forceful in bringing these same issues to the attention of Congress. During the last session of Congress, representatives of numerous coal companies and utilities testified at hearings on bills to place a ceiling on state coal severance taxes. Witnesses included representatives of many of the appellants: for instance, Commonwealth Edison Co., Decker Coal Co., and Detroit Edison Co. And, in spite of appellants' dire warnings by such witnesses as to how Congress' desires for energy independence are threatened by the Montana tax, Congress remained silent.

[5]While Choper would suggest that states are protected, through the structuring and political processes of the Congress and the Presidency, from excesses of the national government against the sovereign prerogatives of the states, Choper, *supra* note 3, at 1600, this *Amicus* is reluctant to concede to the desirability of judicial deference in all federalism disputes. Even with the numerous restraining mechanisms available to states in the Congress, *id.* at 1560-77, a state or region of states might conceivably be victims of unrestrained nationalism supported by a vast majority of the states who might not possess the unique value of concern to the sole state or region of states. In such instances, this *Amicus* would seek recourse to the courts for redress of this encroachment.

power, the Court responded that its own power under article III extends only to proceedings of a justiciable character:

> In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, . . . and it is plain that that question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.

Massachusetts v. Mellon, 262 U.S. 447, 483 (1923). Similarly, these state legislators argue that, when Congress has shown no preemptive intent, similar deference be given to their actions.

The Congress must be imputed with knowledge during the last five years of Montana's tax and of the arguments the energy companies have made concerning its validity. Indeed, these views were presented before Congress during the last session, and several of appellants were active in support of legislation curtailing such taxes. The following is certain: with full knowledge of purported difficulties with the severance tax, Congress has not seen fit to act.

While no party to this action or court could presume to divine the governing intent of Congress in its actions (or, in this case, its failure to act), numerous sound policy arguments might be advanced to explain Congress' reluctance to strike out at the Montana tax. Inaction may well be explained by the success of the formal involvement of individual state delegations in the Congressional process and by the state government backgrounds of many members of Congress who might well have interpreted severance tax limitation as threatening damage to their own conception of the federal scheme.

Congressional restraint might also be explained by a shared belief among many of its members that the Mon-

tana tax, rather than frustrating Congressional energy policy, actually serves that policy well. If the tax increases the price of Montana coal in comparison to the price of coal produced in other states, this result may serve to encourage the development of coal resources in other states and to avoid over-accelerated development in and reliance upon the resources of one state. Congress may well have been impressed by the thoughtful and inventive plans of the state to allocate the tax revenues in mitigation of the present social impacts of energy development and the certain impacts that will accompany the inevitable end of coal mining in that state. Such state action lessens the need for federal impact assistance. Rather than an indication of "resource profiteering" to be vindicated, members of Congress may well consider the Montana tax and trust as a model to be left standing and, indeed, emulated in other States.

Thus, the argument of the energy companies as to some disruption of the national energy scheme has failed on two grounds. First, as a matter of the law of preemption, *supra* at 17 *et seq.*, these appellants have failed to show either explicit or substantial frustration of some well-articulated and coherently developed single energy policy. Second, in this section, we have seen that, despite long-term knowledge of the supposed evils inflicted upon the appellants by the state, Congress has not seen fit to curtail the Montana tax. While many plausible explanations for such inaction can be advanced, this *Amicus* cautions the Court against the self-serving attempts at Congressional mind-reading in which appellants have carelessly engaged. Rather, it is enough for this Court to take cognizance of the simple fact that, for whatever reason, Congress has not acted; and this fact alone should support the general principle of judicial deference in this case.

One argument of appellants is that potential excesses of a high tax which is exported to other states is unrestrained by the political forces of the taxing state. That is to say,

there is no local constituency to restrain an excessively high tax.

In making this argument, however, appellants over-simplify the political system in which taxation policy is formulated. Appellants are not isolated taxpaying entities whose interests are subjected to the whim of the home state. Appellants are not the victims of a home court advantage. These energy companies have sophisticated attorneys, experts, and governmental affairs staffs who influence the development of state policies. More importantly, these companies have Montana employees, shareholders, and contractors who are all citizens of the State, have a stake in its economic and social health, and have access to the political process in which these taxation decisions are made.

B. Were the Commerce Clause to Apply to States' Severance Taxes, Such Inquiry Would Bring upon the Judiciary a Complex Task of Unmanageable and Immense Proportions

For the Court to adjudge the Montana tax as an impediment to interstate commerce would invite litigation of numerous economic issues surrounding state taxation. Much of this litigation would end up before this Court for review as to the correctness of the application of constitutional principles by lower courts.

This is not a simplistic caution that an adverse ruling would "open the floodgates of litigation." Rather, the caution is to suggest that the difficulties of sculpturing an adequate standard, of undertaking sufficient factfinding, and of developing an equitable remedy all argue strongly against the Court interposing itself deeply in this complex economic field. The following delineates these caveats:

1. *The Difficulty of Developing an Appropriate Standard*

By what standard would the Court consider state taxation of its natural resources as resulting in an unac-

ceptable burden on interstate commerce? Two threshold values might be used to trigger further inquiry: (a) taxation at a certain *rate* or beyond; or (b) instate consumption of the taxed good at a certain level or less.

At first glance, each standard might promise to be workable. A coal tax at x percent or more would be inherently suspect, as would in-state consumption of x percent or less. Yet, when placed in a total economic context, both standards would prove unmanageable. While a 50 percent tax on coal would seem high for a state having diverse mineral wealth, is it similarly suspect in a state having no other mineral wealth or, for that matter, no other real wealth at all?

Similarly, a threshold of 10 percent or less instate consumption of the taxed commodity might seem a legitimate gauge for judicial concern. What if the producing state lacks the industrial infrastructure to make use of the resource? What if consumption and population patterns periodically change that proportion? How effective and credible is a standard that has the same erratic movement as the Dow Jones averages?

Neither standard promises the stability or predictability that is legitimately expected of a rule of law. State legislatures would be hard pressed to structure a tax given these uncertainties.

2. *The Difficulty of Evaluating Evidentiary Matters*

Were an adequate constitutional standard formulated by the Court, its application by trial courts to the complex economic realities would present another dimension of difficulties. If the standard were framed in terms of the benefits provided the taxpayer by the state, the question would be how close to an equilibrium between the amount of tax and the benefits provided would be sufficient. Could the tax revenue and value of benefits vary by 10 percent, 20 percent, 50 percent? Is a fictitious entity, such as a cor-

poration, the only beneficiary? Or does the summation of benefits include employees, shareholders, suppliers, contractors?

And, while states have been given discretion to fashion different levels of taxation for different goods and commodities, the inequities between the taxation of coal, as one energy resource, and oil and gas, as similar energy resources, might be too much to be allowed to continue. While the actual rate of tax on coal might be higher (as it is in Montana) than oil and gas, the rate, in terms of BTU's of energy, is quite similar.[6] Does that similarity validate the coal tax or does it constitutionally call into question the validity of all severance taxes? And, by what other equally valid dimensions or characteristics might the variety of severance taxes be compared? Does the validity of the tax also depend on how much can be shifted forward to the consumer; or how much it adds, in relation to freight and processing, to the total price?

3. *The Difficulty of Formulating an Equitable Remedy*

A difficulty also results when one contemplates an adequate remedy to redress appellants' supposed grievances. While these appellants concede the constitutionality of a state severance tax and challenge only the rate of the tax, this concession can be of little help to the judiciary in the resolution of the case.

Appellants indicate that they have paid under protest $135 million as a result of Montana's tax, and the total collections from appellants and other coal producers similarly situated is estimated to be $150 million as of July 1, 1980. Data of Montana Legislative Council.

What equitable remedy can a court fashion in this instance? One possibility would be to declare the tax invalid and order the return to the producers of all collection

---

[6] See text at 23.

made under protest; but this result would unjustly enrich the producers and seriously prejudice the state in terms of the impacts of coal mining since the effective date of the tax.

Thus, absent a judgment returning all tax collections to the energy companies, this Court or the trial court would have to fashion a rate for the tax reasonable in light of commerce clause considerations. One manner by which a court could determine such reasonableness would be on the basis of the costs accruing to the States as a result of mining so as to satisfy appellants' argument of equivalence.

Does a court really want to undertake the extensive microeconomic analysis that inquiry would entail? What special political or economic insight can this Court or the trial court claim to aid in the development of this reasonable tax rate? Can this standard of reasonableness be applied to all coal mining in the Rocky Mountain States? In the West? Throughout the nation? Must the Court look to the content of Congressional proposals, though unsuccessful, to limit the tax? If such Congressional guidance is sought, is not that inquiry alone sufficient justification for judicial abstention from determining the rate?

Presuming a rate of reasonableness could be calculated, and revenues beyond the yield of that rate had been collected, who are the proper recipients of the refund? If the refunds were made to the *de jure* taxpayers, would we be surprised to find these energy companies arguing different theories of economic incidence to thereby defeat the claims of utilities and consumers in other states? Would a court have to assume jurisdiction over all these persons to assure fair distribution of this refund? Do not these difficulties of fashioning a sufficient and just remedy further reinforce the desirability of judicial abstention in this case?

IV

APPLICATION OF THE COMMERCE CLAUSE TO SEVERANCE TAXES OF STATES IS PREVENTED BY SOUND PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT

A. Judicial Invalidation of a Nondiscriminatory State Tax on a Uniquely Local Activity, in this Instance, the Act of Severance, Would Undermine Fundamental Characteristics of our Federal System

In view of the fact that this case has found its way to this most important forum, the fundamental nature of this Union must again be stressed: the national government is one of limited, though often, concurrent powers. The presumptions inherent in the system favor action and competence of each sovereign within its sphere.

While the Constitution attempted to remedy many of the fundamental failures (especially in terms of commerce among the states) of the earlier Articles of Confederation, none of the documents surviving and resulting from that historic Convention in any way support the result the energy companies urge here: the invalidation of a nondiscriminatory tax on a discretely local activity.

What available historic documents do disclose is directly to the contrary. Given the 190 year interval between the writing of *The Federalist Papers* and the origin of this case, how much clearer guidance could those authors have provided this Court in consideration of the instant case than the following:

> Suppose, by some forced construction of its authority (which, indeed, cannot easily be imagined), the federal legislature . . . should undertake to abrogate a land tax imposed by the authority of a State; would it not be . . . evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, *which its Constitution plainly supposes to exist in the State governments?* If there ever should be a doubt on this head, the credit of it will be entirely due

> to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths. (emphasis added)

THE FEDERALIST NO. 33, at 204 (Mentor Book Ed. 1961) (A. Hamilton).

Publius continues in his commentary to characterize this "compound republic" as consisting of parallel sovereigns, each entitled to the supremacy of its laws within its proper sphere. Specifically, concerning the power of States to tax in areas also subject to Congressional exercise of its enumerated powers, he indicates:

> Though a law, therefore, for laying a tax for the use of the United States would be supreme in its nature and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power not granted by the Constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one of the other in a manner equally disadvantageous to both. . . . (emphasis in original)

If these admonitions were so clear as to the interrelationship of the two sovereigns concerning the same governmental function, to-wit: taxation; can any one reasonably suggest that the state taxing power is of any less stature when confronted with an interpretation of the commerce clause?

These conceptions of federalism are not simply antiques surviving to a new and different age. The political and economic value of such decentralized decisionmaking has been recognized by contemporary authors. Thus,

> if efficiency were the principal objective, national energy policy could best be effectuated by the consolidation of the regulatory function at the federal level.
>
> Equally important considerations argue against such consolidation. The impact of energy policy decisions upon the quality of life may be significant. Such decisions well may be better left at the state level where pronounced local concerns can be accommodated or some suitable compromise developed. State governments may be more prepared to accept their own mistakes than the mistakes of the federal government. In the long term, the different decisions made at the state level may result, through a trial and error process, in the identification of the most appropriate course of action which a centralized, and hence less diverse, system might discover only belatedly, if at all. *It may be more important to preserve the values of federalism than to create a symmetrical and efficient energy regulatory mechanism.* (emphasis added)

10 NAT. RESOURCES LAW. 717, 717-19 (1978).

B. Nullification of the Montana Coal Severance Tax Would Violate the Tenth Amendment

It should come as no surprise to the Court that these state legislators believe a reversal of the Montana Supreme Court's decision would place the federal judiciary at the threshold of substantial interference with the "integral governmental functions" protected by this Court's decision in *National League of Cities v. Usery,* 426 U.S. 833 (1976). And, while commentators have faulted the Court for the potential ambiguity in the scope of this guarantee, there can be no doubt that, if state sovereign powers are to be protected in any case by the penumbra of *National League of Cities,* they are to be protected in this case.

National League of Cities suggests two criteria for determining whether a state governmental function is pro-

tected by the Tenth Amendment against the potential application of federal power under the Commerce Clause. These criteria are whether the threatened activities are important activities or whether those activities are traditionally undertaken by state and local governments. In the former category, policy, fire, and other public safety functions are mentioned. By this Court overruling *Maryland v. Wirtz,* 392 U.S. 183 (1968), the implication is that educational and health services also have protection. Traditional governmental activities, those not typically provided by the private sector, add sanitation and parks and recreation services to the list. The unifying standard seems to be those "activities [that] are typical of those performed by the state and local governments in discharging their dual functions in administering the public law and furnishing public services." 426 U.S. at 851.

Both the taxing and spending powers of the state are threatened in this action, and no other challenge could be so disruptive of the state's sovereign authority. The ability of the elected state legislators to enact a nondiscriminatory tax on a typically local activity would always remain subject to review by a federal court on some theory of unconstitutionality (*e.g.,* the allegation of discrepancy between the amount of taxes paid and benefits received).

The implications for the state spending power are equally frightening. Reviewing the failures of earlier mining booms in Montana, the present generation of state officials sought to avoid those pitfalls. Its elected officials chose to dedicate the proceeds of the severance tax for present and future benefit. A trust of constitutional stature was created by the voters to provide a replacement source of wealth for when the coal plays out. Rather than the soiled schemes of "resource profiteers," this planned approach toward development demonstrates rational choices and the highest level of responsibility that could be desired of our public officials. In so acting, the state has diminished its economic reliance

on federal assistance and indicates that one state, rather than deferring to Washington for a solution, has sought to master its own fate. Thus, to paraphrase this Court, if Congressional action or the commerce clause may be used to eliminate such a responsible exercise of basic state governmental powers of taxing and spending, "we think there would be little left of the States' 'separate and independent existence.'" 426 U.S. 851 (1976), *quoting Coyle v. Oklahoma,* 221 U.S. 559, 580 (1911).

CONCLUSION

For the reasons argued in this Brief, the Western Conference, representing the state legislators of the Western States and territories, respectfully urges the Court to affirm the decision of the Montana Supreme Court and, in so doing, reaffirm the traditional principles of federalism in which state governments need and do play a vital part.

Respectfully submitted,

Of Counsel:
PATRICIA B. SPRAGUE
165 Post Street,
Fifth Floor
San Francisco, CA 94108
(415) 986-3760

JOHN E. THORSON
Western Regional Counsel
Council of State
Governments
165 Post Street,
Fifth Floor
San Francisco, CA 94108
(415) 986-3760
Counsel of Record

Attorneys for the Amicus Curiae

February, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-581

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

against

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICUS CURIAE OF THE WESTERN GOVERNORS' POLICY OFFICE (WESTPO) IN SUPPORT OF APPELLEES

David E. Engdahl
ENGDAHL & RENZO, P.C.
730 17th Street, Suite 301
Denver, Colorado 80202
(303) 571-0852
Attorney for Amicus Curiae
Western Governors' Policy
Office (WESTPO)

TABLE OF CONTENTS

	Page
Statement of Interest of Amicus	1
Argument and Conclusion	3

CONSENT OF PARTIES

Consents of all Appellants and all Appellees to the filing of this Amicus Brief have been obtained. Letters from counsel for all Appellants and all Appellees accompany this Amicus Brief for filing, unless they have been delayed in the mail, in which case they will be filed promptly upon receipt by counsel for Amicus.

No. 80-581

In the

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY, ET AL.,

Appellants,

against

STATE OF MONTANA, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

BRIEF AMICUS CURIAE OF THE WESTERN GOVERNORS' POLICY OFFICE (WESTPO) IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST OF AMICUS

The Western Governors' Policy Office (WESTPO) is an instrumentality of twelve States (Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming). WESTPO's members are the Governors of those twelve states, and the twelve member Governors constitute WESTPO's Board of Directors.

WESTPO was organized in non-profit corporate form by the member Governors during the September, 1977 annual meeting of the Western States' Governors in Anchorage, Alaska, for exclusively governmental purposes, to provide an instrument for state policy management and a vehicle for collective expression and influence with respect to important state, regional, interstate, and federal-state issues.

As conceded by Appellants, "[t]his case . . . presents fundamental constitutional questions of the state's power to impose taxes in a factual context of extreme importance." Appellants' Brief at 7.

WESTPO agrees with Appellants' characterization of the case as presenting fundamentally important national, state, regional, and federal-state issues. Thus, this case presents issues squarely within WESTPO's responsibilities and interest. The instant case involves the traditional power of a state to tax the severance of coal resources, and thereby to generate revenue to provide for essential governmental services. Each of the WESTPO member states taxes the severance or production of natural resources.

WESTPO is deeply concerned about Appellants' challenges to this traditional state power on the basis of nebulous allegations of constitutional infirmity. Appellants' arguments support their own economic interest to the disadvantage of compelling state, regional and

national interests in providing for the present and future needs of state citizens.

ARGUMENT AND CONCLUSION

WESTPO concurs in and supports the arguments advanced in the Amicus Curiae Brief filed herein by the State of Wyoming and certain other States. For the reasons therein stated, WESTPO urges that the decison of the Supreme Court of the State of Montana herein be sustained.

Respectfully submitted,

David E. Engdahl
ENGDAHL & RENZO, P.C.
730 17th Street, Suite 301
Denver, Colorado 80202
(303) 571-0852

Attorney for Amicus Curiae
Western Governors'
Policy Office (WESTPO)

No. 80-581

Office-Supreme Court, U.S.
FILED
FEB 25 1981
ROBERT L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF THE STATES OF WYOMING, COLORADO, NEVADA, IDAHO, WASHINGTON, AND OREGON AS AMICI CURIAE

John D. Troughton,
Attorney General
of Wyoming,
Counsel of Record
Mary B. Guthrie,
Assistant Attorney General
Dennis M. Boal,
Assistant Attorney General

Nancy D. Freudenthal,
Special Assistant
Attorney General
State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

Of Counsel
Steven F. Freudenthal
David D. Freudenthal
Sherman & Howard
1712 Pioneer Avenue
Cheyenne, Wyoming 82001
(307) 632-1712

Alan B. Minier
Hirst & Applegate
Boyd Building
Cheyenne, Wyoming 82001
(307) 632-0541

February 1981

J.D. MacFarlane
Attorney General
of Colorado

David H. Leroy
Attorney General
of Idaho

Richard H. Bryan
Attorney General
of Nevada

Kenneth O. Eikenberry
Attorney General
of Washington

Dave Frohnmayer
Attorney General
of Oregon

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

BACKGROUND 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. JUDICIAL EXAMINATION OF STATE TAXES UNDER ONLY A TAX BENEFIT CHALLENGE SHOULD BE EXTREMELY LIMITED 8

A. JUDICIAL SCRUTINY OF THE RELATIONSHIP BETWEEN TAX BENEFITS AND BURDENS SHOULD BE SEVERELY RESTRICTED IN DEFERENCE TO THE STATE'S INTEREST IN DEVELOPING RESPONSIBLE FISCAL AND REGULATORY MEANS TO ADDRESS PRESENT AND FUTURE GOVERNMENTAL COSTS IMPOSED BY RAPID COAL DEVELOPMENT 10

B. FACTUAL INQUIRY INTO WHETHER THE TAX IS FAIRLY RELATED TO BENEFITS AND SERVICES PROVIDED BY THE STATE, ABSENT OTHER CIRCUMSTANCES, INVITES A FLOOD OF COMMERCE CLAUSE CHALLENGES 14

II. THE APPELLANTS HAVE FAILED TO IDENTIFY ANY PURPOSES AND OBJECTIVES OF CONGRESS THAT CAN SERVE AS A BASIS FOR PREEMPTION OF THE MONTANA STATE SEVERANCE TAX UNDER THE SUPREMACY CLAUSE 16

Page

A. AS A MATTER OF LAW, CONGRESS HAS NOT PREEMPTED STATE COAL SEVERANCE TAXES..... 18

B. THE "SUBSTANTIAL FRUSTRATION" TEST PROPOSED BY APPELLANTS WOULD BE AN UNWISE DEPARTURE FROM ESTABLISHED PRECEDENT..... 20

III. APPELLANTS HAVE INCORRECTLY INTERPRETED THE POLICIES OF THE MINERAL LANDS LEASING ACT OF 1920, AS AMENDED, AND THEIR SUPREMACY CLAUSE CLAIM IS INVALID..... 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934)..... 17

Arizona Public Sevice Co. v. Snead, 441 U.S. 141 (1979) 9

Carmichael v. Southern Coal Co., 301, U.S. 495 (1937). 14,16

Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) 13

City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974) 17

Commonwealth Edison Co. v. State, 615 P. 2d 847 (Mont. 1980) 18

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 6,8,9,10

DeCanas v. Bica, 424 U.S. 351 (1976) 19

Exxon Corp. v. Governor of Maryland, 437 U.S. 177 (1978) 11

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) 17

Freeman v. Hewitt, 329 U.S. 249 (1946) 8

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 20

Hines v. Davidowitz, 312 U.S. 52 (1941) 17,19,20

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 10,12

Page

Jones v. Rath Packing Co., 430 U.S. 519 (1977) .. 16,17,19,22

McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940) 17

Minnesota v. Clover Leaf Creamery Co., 49 U.S.L.W. 4111 (1981) 13,26

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) 17

National League of Cities v. Usery, 426 U.S. 833 (1976) 11,13,14

New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665 (1950) 17

Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923) 8

Perez v. Campbell, 402 U.S. 637 (1971) 19

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 25

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 19

Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945) 12

Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951), *rev'd.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 8

Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) 8

Washington Revenue Dept. v. Stevedoring Ass'n, 435 U.S. 734 (1978) 10,12

Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 8

Page

Wickard v. Filburn, 317 U.S. 111 (1942) 8

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 8

CONSTITUTIONS, STATUTES AND REGULATIONS

Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 19

Energy Research and Development Administration Act (Authorizations and Appropriations for 1977), Pub. L. No. 95-39, 91 Stat. 180 19

Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 18

Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 24

Federal Land Management and Policy Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 25

§ 317, 90 Stat. 2770, 30 U.S.C. § 191 (1976) 25

Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437.. 7

Ch. 85, § 32, 41 Stat. 450, 30 U.S.C. § 189 (1976) .. 22

Ch. 85, § 35, 41 Stat. 450 24

MONT. CODE ANN. (1977): § 15-35-108 5,12

Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 661-678 (1976 and Supp. III 1979) *(as amended)* 6

Page

National Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. (Supp. III 1979), §§3301 *et seq* 18

National Environmental Policy Act of1969, Pub. L. No. 91-190, 83 Stat. 852, 452 U.S.C. §§4321-4347 (1976) 6

Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. §§8301 *et seq.*, (Supp. III 1979) 18

Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, 16 U.S.C. §§2601 *et seq.*, (Supp. III 1979) 18

Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 447, 30 U.S.C. §§1202-1328 (Supp. III 1979) 6

WYO. CONST.: Art. XV, §3 4

WYO. STAT. (1977 and 1980 cum. supp.):
39-6-302 3
39-6-303 3
39-6-305 4,5
39-6-306 4
35-11-101 to 1104 6
35-12-101 to 121 6

LEGISLATIVE HISTORY

58 Cong. Rec. 7646-49 (1919) (remarks of Mr. Mondell) 23

58 Cong. Rec. 7652 (1919) (remarks of Mr. Ferris) .. 23

Page

58 Cong. Rec. 7772-74 (1919) 23

58 Cong. Rec. 7777 (1919) (remarks of Mr. Hersman) .. 24

59 Cong. Rec. 2711 (1920) (remarks of Mr. Taylor) ... 23

H.R. Rept. No. 94-681, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 1953 24

H.R. Rept. No. 17 (Part 2), 64th Cong., 1st Sess. 8 (1916) (minority views of Mr. Taylor) 23

S. Rep. No. 95-361, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173..... 24

OTHER AUTHORITIES

1 AMERICAN LAW OF MINING (1960) 23

Annual Report of the State Treasurer [for the period ending June 30,1980] (Wyoming State Treasurer, October 1, 1980) 4

Andrews & Waits, *Environmental Values in Public Decisions* (1978) 6

The Boom Town: Problems and Promises in the Energy Vortex (Davenport and Davenport eds. 1980) 13

Bureau of Land Management of the Department of Interior, *Final Environmental Statement, Federal Coal Management Program* (April 1979) 2

House, *The Quest for Completeness* (1976) 6

Mineral Division, Wyoming Department of Economic Planning and Development, *1980 Wyoming Mineral Yearbook* (January 1981) 3

Page

President's Commission on Coal, *Coal Data Book* (Feb. 1980) 5

President's Commission on Coal, *Recommendations and Summary Findings* (March 1980) 5

Report from the Wyoming Department of Environmental Quality to Governor Ed Herschler (January 1981) 11

Tribe, *American Constitutional Law* (1978) 10,13

Wechsler, "The Political Safeguard of Federalism — The Role of the States in the Composition and Selection of the National Government," 54 Colum. L. Rev. 543 (1954) 20

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, ET AL.,

Appellants,

—against—

STATE OF MONTANA, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF THE STATES OF WYOMING, COLORADO, NEVADA, IDAHO, WASHINGTON, AND OREGON AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This Brief is filed on behalf of the State of Wyoming and is sponsored by the Attorney General of the State of Wyoming as authorized by Supreme Court Rule 36.4. This Brief is also filed on behalf of the States of Colorado, Nevada, Idaho, Washington and Oregon.

Within many of the Amici states lie substantial quantities of coal and other natural resources. These states have exercised their traditional power to tax the severance of these natural resources for many years. Although the rate and incidence of the severance taxes imposed by these states are not uniform, all of them share a common interest in this action. The taxing and governmental structure of each would be adversely affected by a decision of this Court which accepted,

in whole or in part, the arguments of Appellants.

The Amici States support the Brief submitted by Appellees and would urge the Court to affirm the decision of the Supreme Court of the State of Montana for the reasons set forth therein. As more fully set forth herein, the Amici States assert that: (1) the ability of a state to generate revenue to provide for general governmental services must override vague considerations of a burden on interstate commerce, and (2) an implied federal "policy" which is self-contradictory cannot preempt the taxing power of a state, particularly where federal laws reserve that taxing authority to the state.

BACKGROUND

As of 1976, the demonstrated coal reserve in the United States was 438 billion tons. Approximately 235 billion tons were in the western United States and 203 billion tons were in the eastern United States. This reserve base supported coal production of 679 million tons in 1976. [1] Demonstrated coal reserve base and coal production for the six western states of Colorado, Montana, New Mexico, North Dakota, Utah and Wyoming are set forth below and compared with the national total: [2]

---

1. Bureau of Land Management of the Department of Interior, *Final Environmental Statement, Federal Coal Management Program*, Table 2-1, at 2-3 (April, 1979) (hereinafter "Federal Coal Management Program").

2. *Id.*, at Tables 2-2 and 2-8.

	Demonstrated Reserve Base 1976 (billion tons)	Coal Production (million tons) 1962	1972	1976
Colorado	16	3.4	5.6	9.4
Montana	120	0.4	8.2	26.2
New Mexico	4	0.7	8.2	9.8
North Dakota	10	2.7	6.6	11.1
Utah	6	4.3	4.8	8.0
Wyoming	55	2.6	10.9	30.9
National Total	438	421.3	590.7	678.7

Clearly, the nation's coal reserve base and production are broadly distributed. However, growth in western coal production from 1962 to 1976 has been extremely rapid. This rapid growth can be further illustrated by examining both Wyoming production and applicable severance tax rates:

State of Wyoming

Year	Tons Produced (million)[3]	Severance Tax Rate
1962	2.6	0
1970	7.0	1%
1972	10.9	1%
1976	30.9	5.2%
1979	68.8	10.5%
1985 (est.)	150.0	—

The State of Wyoming presently levies a 10.5% severance tax on coal, W.S. §§39-6-302 and 39-6-303 (1977), not the 17% previously suggested by Appellants.[4] In addition, coal is subject to a local property (ad valorem) tax of ap-

3. *1980 Wyoming Mineral Yearbook*, at 15-16 (Mineral Division, Wyoming Department of Economic Planning and Development, January 1981).

4. Brief of Appellants at 9 n.2.

proximately 6.5%.[5] The 10.5% and 6.5% rates are both applied to the market value of the coal on production, excluding certain expenses such as hauling costs, tippling allowance, federal royalties, federal black lung fee and federal reclamation fee.

The proceeds of the state severance tax are distributed in accordance with a statutory formula to meet both present and future needs. For fiscal year 1980, approximately 42 million dollars was collected and distributed[6] as follows: general fund, $8 million; permanent mineral trust fund, $10 million; capital facilities account,[7] $6 million; coal impact ac-

---

5. Under Wyoming Constitution Article 15, Section 3, land used in mineral production is exempt from taxation upon the value of the land. Instead, it is taxed on the gross value of the minerals produced. The applicable percentage figure varies from county to county as the property tax rates vary.

6. Distribution is governed generally by W.S. §39-6-305 (1977). Total Wyoming state revenues from all sources for fiscal year 1980 was $971 million. *Annual Report of the State Treasurer [for the period ending June 30, 1980]* 6 (Wyoming State Treasurer, October 1, 1980).

7. The capital facilities revenues are distributed by the Capitol Building Commission under W.S. §39-6-306 (1980 cum. supp.): thirty percent finances school district capital construction entitlements; ten percent finances community college construction; and sixty percent is distributed to the highway fund for constructing, repairing and acquiring highways and related facilities.

count;[8] $8 million; water development account,[9] $6 million; and highway fund, $4 million.

The State of Montana also distributes coal severance tax proceeds with a concern for both the present and future needs of the state and its residents. The percentages have varied over time but allocations have been made to: the permanent trust fund; the county of origin; the state general fund; the local impact and education trust fund; alternative energy research and development; the county land planning account; the renewable resource development account; the parks acquisition and legacy fund; the coal area highway improvement account; and the public school equalization aid fund. Mont. Code Ann. §15-35-108 (1979).

The growth in regional and state coal production rebuts the assertion that state and local governmental fiscal policies have burdened coal production and use.[10] Further-

8. The Wyoming Farm Loan Board disburses this money to local political subdivisions and the state highway department to finance public water, sewer, highway, road or street projects in areas impacted by coal production. W.S. §39-6-305 (e) (1980 cum. supp.).

9. The legislature authorizes water development projects, financed from this fund. W.S. § 39-6-305 (g) (1980 cum. supp.).

10. The Presidents's Commission on Coal explicitly identified increasing rail tariffs for coal as possibly moderating the current boom in western coal production. President's Commission on Coal, *Coal Data Book*, at 198 (Feb. 1980). The Commission identified "[t]he undue burden placed on coal haulage by the ICC [a]s slowing the rate of voluntary coal conversion and raising the delivered price of domestic coal to the point where imported coal. . . is the cheaper to some users." President's Commission on Coal, *Recommendations and Summary Findings*, at 7 (March 1980). The Commission reports do not raise any similar concerns with regard to state severance taxes.

more, federal and state statutes establish a common policy that mining should occur on terms which preserve environmental quality and protect human health and safety. [11] State fiscal policies, tailored to the needs of each state and designed to insure that the ultimate costs of rapid coal development are internalized to the coal,[12] complement this common policy.

SUMMARY OF ARGUMENT

I

Expansion of the scope of the Commerce Clause, coupled with elimination of the absolute immunity from state taxation that interstate commerce once enjoyed, has invited Commerce Clause scrutiny of state taxes under the four-pronged test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (hereinafter "*Complete Auto Transit*"), on activities which were previously characterized as purely local. Where the taxed activity has a substantial nexus with the taxing state, the tax is fairly apportioned and the tax does not discriminate against interstate commerce, judicial scrutiny of tax benefits should be severely limited in deference to state interests and in the interest of judicial

---

11. *E.g.*, The National Environmental Policy Act of 1969, P.L. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321-4347 (1976); Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 91 Stat. 447, 30 U.S.C. §§ 1201-1328 (Supp. III 1979); Occupational Safety and Health Act of 1970, P.L. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 661-678 (1976 and Supp. III 1979) (as amended); Wyoming Environmental Quality Act, W.S. §§35-11-101 to 1104 (1977); Industrial Development Information and Siting Act, W.S. §§35-12-101 to 121 (1977).

12. *See generally*, House, *The Quest for Completeness* (1976); Andrews and Waits, *Environmental Values in Public Decisions* (1978).

economy. Long-term pass-through contracts should not become vehicles to clog the federal judiciary with numerous challenges to state tax structures. Unless the federal judiciary is willing and able to calculate user fees in lieu of state taxes of general application, great deference must be given to tax rates as determined by state legislative processes. Finally, the balance of governmental interests is best served by leaving the determination of tax benefits to congressional and state legislative resolution.

II

The Appellants cannot succeed under their Supremacy Clause analysis. The volume of federal energy legislation encouraging coal production is distinct from, and consistent with, the application of a state severance tax. Federal energy legislation is as consistent with a state severance tax as it is with any state tax which increases coal energy costs, whether at the mine site or in the consuming state. In addition, a "sliding scale" of preemption analysis is unsupported by past Supreme Court precedent and cannot be equitably applied within the federal system.

III

Appellents' Supremacy Clause argument under the Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437, is supported by neither statutory language nor legislative history. Not only are the relevant statutes clear and unambiguous regarding the states' concurrent taxation jurisdiction, but nothing in the legislative history clouds these provisions.

ARGUMENT

I

JUDICIAL EXAMINATION OF STATE TAXES UNDER ONLY A TAX BENEFIT CHALLENGE SHOULD BE EXTREMELY LIMITED

The historical development of Commerce Clause theory in state taxation focuses the issue before the Court. From the early part of the century until 1977, any recognition that the "operating incidence", *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940), of a state tax affected interstate commerce placed its validity in jeopardy. *Spector Motor Serv., Inc.* v. *O'Connor*, 340 U.S. 602 (1951), *rev'd, Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977); *Freeman* v. *Hewitt*, 329 U.S. 249 (1946). Commerce Clause challenges to state taxes were generally upheld absent a demonstration that the taxed activity was local in nature. *E.g., Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923). But the expansion of the scope of the Commerce Clause, *e.g., Wickard* v. *Filburn*, 317 U.S. 111 (1942), and the judicial recognition that interstate commerce may be required to "pay its way", *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), compelled this Court to expressly eliminate the absolute immunity from state taxation that interstate commerce once enjoyed. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-289 (1977).

Complete Auto Transit reversed a series of cases which applied a *per se* rule of unconstitutionality to state taxes imposed on interstate commerce. In that case, the Court abandoned its formalistic approach of invalidating state taxes relating to interstate commerce and set out a new four-pronged test. In order to survive Commerce Clause scrutiny,

the activity taxed must: (1) have a sufficient nexus with the state; (2) be fairly apportioned to local activities; (3) not discriminate against interstate commerce; and (4) be fairly related to services and benefits provided by the state to the taxpayer. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977).

The case presently before the Court is *not* the *Complete Auto Transit* case. The instant case involves issues substantially different from those present in *Complete Auto Transit.* The Appellants do not challenge the nexus or fair apportionment of severance taxes. More importantly, the potential for the multiple levy of similar taxes, present in *Complete Auto Transit* and its predecessors, is absent here. Coal plainly can be mined only once, and in one place. It follows that Appellants' challenge to the rate of Montana's tax is a departure from the precedent, and for this reason alone, should be denied. Simply stated, the Appellants seek judicial reduction of the state-imposed *rate* of tax on the basis that the *rate* of tax on a local activity discriminates[13] against

---

13. The question of discrimination, however phrased, is not an issue under the facts at bar. Neither Wyoming nor Montana apply a severance tax formula which depends in any way upon the ultimate destination of the coal or any residency attributes of the producer. All energy consumers, both in-state and out-of-state, bear the same severance tax cost. The discrimination question was at issue in *Arizona Public Service Co.* v. *Snead,* 441 U.S. 141 (1979). Construing the Congressional definition of "discriminatory" contained in the Tax Reform Act of 1976, the Court held that, "Congress required only that New Mexico, if it chooses to tax the generation of electricity for consumption in either city, [whether in or out-of-state], tax it equally for each." *Id.,* at 151. The tax structures for both Montana and Wyoming tax the severance of coal, like the generation of electricity, equally for any destination.

interstate commerce and is not fairly related to services and benefits provided by the state to the taxpayer.

A. JUDICIAL SCRUTINY OF THE RELATIONSHIP BETWEEN TAX BENEFITS AND BURDENS SHOULD BE SEVERELY RESTRICTED IN-DEFERENCE TO THE STATE'S INTEREST IN DEVELOPING RESPONSIBLE FISCAL AND REGULATORY MEANS TO ADDRESS PRESENT AND FUTURE GOVERNMENTAL COSTS IMPOSED BY RAPID COAL DEVELOPMENT

The tax which comes under constitutional attack today is more than a compensatory tax, and is supported by more than a state's fiscal interest. The coal severance tax has an implicit regulatory effect with respect to the timing, setting and terms for nonrenewable resource development, which recognizes present and future needs. A thorough analysis of the impacts of coal development in rural states demonstrates that a coal severance tax is not "a bill presented to interstate commerce for services rendered by the taxing state." Tribe, *American Constitutional Law* 346 (1978). The state interests transcend the generation of revenues, and past decisions of this Court on revenue-raising taxes imposed on interstate commerce are not conclusive.*E.g., Complete Auto Transit, Inc.* v.*Brady, supra; Washington Revenue Dept.* v. *Stevedoring Ass'n.,* 435 U.S. 734 (1978); *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). Therefore, this Court must fashion a test which fully considers the burdens imposed by extraction industries on states and their citizens.

The Wyoming coal severance tax internalizes both the present and future costs of rapid coal development by accounting for social, economic, environmental and regulatory costs. In addition, the tax reserves a portion of the asset value through a trust fund, the earnings of which will be available as revenues for government operating costs once the coal

resource is depleted.[14] Meeting present and future needs is of utmost concern to a state in its sovereign capacity. Implicit in the decisions of this Court is the conclusion that the federal government cannot undermine the ability of states and their subdivisions to provide governmental services. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Absent a clear and compelling national interest, an attack on a state's fiscal decisions to provide traditional, essential governmental services cannot be sustained. Under the Commerce Clause, the state's interest in providing governmental services is paramount to Appellants' interest in maintaining their particular markets at an economic optimum. *Cf.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (the Commerce Clause protects the interstate market, not particular interstate firms).

Appellants' claim that a trial is necessary to determine whether the tax is fairly related to benefits and services provided by the state ignores the statutory distribution established for the Montana severance tax. On the face of the Montana statute, provision is made for state operating funds, county operating funds, a permanent trust fund to generate future government revenues, alternative energy research, county planning, local impact and education, renewable

14. Wyoming has already experienced a boom-bust cycle through the uranium industry. Uranium prices peaked at $43.00 per pound in 1978, and remained relatively constant for several years at $40.00. A precipitous price drop began in early 1980. The price today is $28.00 per pound. The price drop has resulted in a number of mines and research operations closing down, with no apparent reclamation goals. Many others have cut production. Report from the Wyoming Department of Environmental Quality to Governor Ed Herschler (January, 1981). Wyoming can expect the market for its coal to be similarly affected by any number of externalities, including rising transportation costs or lowering federal air quality standards.

resource development, park acquisition, the arts, coal area highway improvements and equalization of public school funds. Mont. Code Ann. §15-35-108 (1979). While Appellants assert that a "fair relationship" need not be determined with dollar-for-dollar precision, they refuse to acknowledge that the above uses of the tax establish the fair relationship by providing the coal producing Appellants with ". . . services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society." *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 436 (1979). The decisive point is that this tax provides services and benefits which are neither slight nor problematical and, therefore, is not subordinate to the national interest in a free flow of interstate commerce. *Cf., Washington Rev. Dept.* v. *Stevedoring Ass'n.,* 435 U.S. 734, 747 (1978). This test is the fiscal side of the balancing test for state safety measures enunciated in *Southern Pacific Co.* v. *Arizona ex. rel. Sullivan,* 325 U.S. 761, 775-776 (1945).

This case involves governmental functions and services as discussed in the *Usery* case. The Appellants' restrictive view of governmental functions and services does not reduce the impact of rapid coal development in a sparsely populated area. Typically, the existing ranching or farming community lacks the infrastructure or resources to accommodate rapid industrial growth. Some towns will be created overnight. Millions of dollars must be expended for necessary capital facilities, including: sewage treatment, water treatment and distribution, solid waste, mental and physical health care, recreation and library, transportation, and educational facilities. In addition, the traditional police, fire and sanitation services must be provided.

The costs most difficult to calculate, however, are those associated with social problems accompanying rapid coal development. Boom-town conditions generate a dis-

proportionately high number of mental health problems, including alcoholism and child and spouse abuse, which require treatment and create a high demand for mental health services.[15] These conditions must be met by state and local funding for human service agencies and programs.

The high social, economic and environmental costs which accompany coal development are visible to any casual observer of the mines, the power plants, the trains, the saloons and the trailer camps of the area. These costs must be absorbed by state and local treasuries, funding new and revised facilities, programs and services. "Indeed, it is functions such as these which the states have traditionally afforded their citizens." *National League of Cities* v. *Usery*, 426 U.S. 833,851 (1976). The Appellants cannot now be allowed to disrupt and undermine the states' fiscal structure for the performance of these traditional, essential governmental functions and services. No less than a firm demonstration that the tax clearly exceeds the state and local governments' interests should be accepted when individual rights to basic services are put in jeopardy. Tribe, *American Constitutional Law* 314 (1978).

One additional state interest which must be considered is the state's duty to account for future governmental costs and services which occur when the physical wealth of a state is depleted. Quite recently this Court recognized resource conservation as a legitimate state purpose. *Minnesota* v. *Clover Leaf Creamery Co.*,____U.S.____, 49 U.S.L.W. 4111, 4113 (1981). The Minnesota case emphasizes an earlier Court pronouncement that "a state is justifiably concerned with preventing rapid and uneconomic disruption of one of its chief natural resources." *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 187 (1950).

The producers of coal in any particular region are not

15. For an account of the social and human costs of resource development, *see The Boom Town: Problems and Promises in the Energy Vortex* (Davenport and Davenport eds. 1980).

the sole beneficiaries against which to measure the benefit or burden of the taxes imposed thereon. Their employees and families and the employees and families of coal-induced support industries are equally germane to the calculation. State fiscal policies which provide protection against the year-to-year vagaries and impacts of coal production and which also look to the future welfare of the general population associated with that production vindicates "... the most fundamental principle of government—that it exists primarily to provide for the public good." *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 522-523 (1937). Providing for the public good requires decisions now in order to meet future expectations of basic governmental services. The Appellants here should not be allowed to emasculate a state's ability to meet these responsibilities. To accept Appellants' assertion would result in "displacing state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *National League of Cities* v. *Usery*, 426 U.S. 833, 847 (1976).

B. FACTUAL INQUIRY INTO WHETHER THE TAX IS FAIRLY RELATED TO BENEFITS AND SERVICES PROVIDED BY THE STATE, ABSENT OTHER CIRCUMSTANCES, INVITES A FLOOD OF COMMERCE CLAUSE CHALLENGES

The utility Appellants purchase Montana coal ". . .pursuant to long-term coal purchase contracts which provide that the costs of taxation will be passed along to the consuming utilities" (hereinafter referred to as "pass-through contracts"). Brief of Appellants at 8. All Appellants have conceded ". . . that the severance of natural resources within a state is an appropriate subject of that state's taxation." Brief of Appellants at 6.

Long-term pass-through contracts are frequently used in business. If the Court grants the factual inquiry into tax benefits sought by the Appellants, any entity in circumstances similar to the instant case could raise a Com-

merce Clause challenge. Such challenges would not necessarily be limited to natural resource taxation cases. This result would be inimical to the taxing structure of each and every state in the Union, as well as injecting the judiciary into lengthy and imprecise determinations of legislative facts.

Appellants concede that "[t]here is no point in the continuous process of taking coal from a mine and delivering it for use at which it is necessary or appropriate to prohibit state taxation absolutely, even assuming that the process has become interstate commerce." Brief of Appellants at 24. While Appellants concede that state coal severance taxes are valid, they ask the Court to undertake a factual inquiry into tax benefits to provide guidance to state legislatures on setting those rates. What rate of severance tax could be established by a state legislature. What costs could be constitutionally included in determining the tax rate: the cost of providing public roads and bridges to coal trucks, the cost of providing governmental services to only the employees of coal producers, the cost of providing governmental services to the spouses and children of employees of coal producers, the cost of providing governmental services to the employees and families of coal service industries, or the risk cost of higher unemployment and welfare in the event of a precipitous downturn in coal production and employment.

If the state legislature has no latitude in which its sound discretion will be accepted as valid and each tax must be justified by a cost accounting, any state tax affecting interstate commerce would be relegated to a users fee. Such a decision would repudiate long-standing principles of taxation:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is

> constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other views would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of the government—that it exists primarily to provide for the public good.

Carmichael v. *Southern Coal Co.*, 301 U.S. 495, 522-523 (1937). The rate of a tax is a determination for the state legislature to make, not a court.

II

THE APPELLANTS HAVE FAILED TO IDENTIFY ANY PURPOSES AND OBJECTIVES OF CONGRESS THAT CAN SERVE AS A BASIS FOR PREEMPTION OF THE MONTANA STATE SEVERANCE TAX UNDER THE SUPREMACY CLAUSE

In Count II of their Complaint, Appellants asserted that a national policy favoring the production and use of coal, particularly low-sulphur western coal, is "substantially frustrated" by the Montana Coal Severance Tax, and hence unconstitutional under the Supremacy Clause. They now claim that the Montana Supreme Court erroneously failed to recognize this alleged national policy and erroneously failed to apply a "substantial frustration" test as proposed by Appellants. Appellants are incorrect in both respects.

It is well settled that "congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict."

Jones v. *Rath Packing Co.*,430 U.S. 519, 525 (1977). In concluding that a state law should give way, the Court must determine whether, under the circumstances of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, at 526. The question here is whether the many congressional acts passed in response to the Arab Oil Embargo of 1973 preempt state severance taxes on coal. This inquiry must be undertaken with full recognition of the concurrent taxing powers of the state and national governments. *Hines* v. *Davidowitz*, 312 U.S. 52, 67, n. 21 (1941). Recognizing this concurrent taxing power, the Court has struck down state taxes under the Supremacy Clause only in circumstances of patent conflict with federal interests. *E.g.*, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940).

Appellants' Supremacy Clause challenge is, of their own admission, limited. The only matter presented is whether the tax stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Brief of Appellants at 42. Significantly, there is no claim that conflicts between federal and state law render compliance with each impossible. *See, Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132, *reh. den.* 374 U.S. 858(1963). Nor is the tax said to constitute, in substance and effect, the direct exertion of a forbidden power, as for example, the confiscation of property. *See, A. Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934); *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

A. AS A MATTER OF LAW, CONGRESS HAS NOT PREEMPTED STATE COAL SEVERANCE TAXES

The Montana Supreme Court correctly decided that, for the purposes of a motion to dismiss, the Montana District Court was not required to accept Appellants' allegations of law and legal conclusions as true. *See, Commonwealth Edison Co. v. State*, 615 P. 2d 847, 849 (Mont. 1980) Both Montana courts afforded Appellants ample opportunity to establish the purposes and objectives of Congress, a matter of law, by the presentation of various documentary sources. Supreme Court of Montana, No. 14982, Appendix to Brief of Appellants at 165 *et seq*. These sources are said to reveal a national policy for the encouragement of coal production. Brief of Appellants at 35 *et seq*. The State of Montana has addressed the fallacy of treating a vague national policy—rather than any clearly demonstrated purposes and objectives of Congress—as the basis for preempting state severance taxes. However, there are additional reasons for denying the Appellants an opportunity for trial.

While the volume of federal legislation related to energy matters certainly testifies to the complexity of the subject, most of the individual elements of the legislation are irrelevant to coal severance taxes. This is apparent from a cursory review of the five acts commonly known as the National Energy Policy, which include such diverse items as small hydroelectric power projects, Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§401 *et seq*.; gasohol, Energy Tax Act of 1978, Pub. L. No. 95-618, §221, 92 Stat. 3185; federal photovoltaic utilization, Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§561 *et seq*.; prohibition on use of natural gas for decorative outdoor lighting, Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, §402; and natural gas curtailment policies, Natural Gas Policy Act of 1978, Pub. L. No. 95-621, §§401 *et seq*. Appellants, having failed to articulate the alleged

conflict, cannot impose the burden of discovering a conflict on the courts.

Appellants' reliance on specific legislation is similarly strained. For example, the Montana severance tax has neither impeded federal reorganization under the Energy Reorganization Act of 1974, Pub. L. No. 93-438, nor impaired federal research efforts under the Energy Research and Development Administration Act (Authorizations and Appropriations for 1977), Pub. L. No. 95-39.

The Appellants' claim presupposes that the whole of federal energy policy is greater than the sum of its parts. This approach has never been adopted by the Court in its decisions. *E.g., Ray* v. *Atlantic Richfield Co.*,435 U.S. 151 (1978); *Jones* v. *Rath Packing Co.*,430 U.S. 519 (1977); *Perez* v. *Campbell*, 402 U.S. 637 (1971);*Hines* v. *Davidowitz*, 312 U.S. 52 (1941). In this case, there is no direct interference with federal law, as in *Perez* v. *Campbell*. There is no clear statement of federal purpose with which the tax inexorably conflicts, as in *Jones* v. *Rath Packing Co.* There is no comprehensive scheme of state regulation which parallels that of the federal government, as in *Ray* v. *Atlantic Richfield Co.* Nor have Appellants adduced any ambiguity of state regulatory structure which warrants further analysis, as in *DeCanas* v. *Bica*, 424 U.S. 351 (1976). The federal government has chosen to encourage coal production and utilization in certain limited ways. Montana has done nothing to interfere with the federal government's chosen methods.

Moreover, the consequences of allowing national policies, inferred from a complex fabric of broadly related legislation, to supplant state law are disastrous. In adjudicating natural resource issues, the judiciary would be requested to create resource colonies within the nation,

decisions better left to Congress.[16] Under the Appellants' theory, any congressional action may give rise to preemption in ways unforeseen and unintended by the Congress. A national program for the relief of the automobile industry, for example, could conceivably justify preemption of state taxes on automobiles and their many parts. Congress, rather than the courts, should be the forum for the resolution of intersectional political matters.

Preemption arises from an exercise of congressional power. Appellants have failed to demonstrate the nature and extent of the congressional action to which the Montana tax must yield

B. THE "SUBSTANTIAL FRUSTRATION" TEST PROPOSED BY APPELLANTS WOULD BE AN UNWISE DEPARTURE FROM ESTABLISHED PRECEDENT

Preemption under the Supremacy Clause is an all-or-nothing proposition. If preempted, a state law and all state laws like it, must yield to paramount federal power. This Court, in finding preemption under the Supremacy Clause, has invalidated state laws which were conflicting, contrary to repugnant, irreconcilable, and inconsistent with federal laws. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Appellants, however, rely on penumbras of congressional action to establish preemption, an acceptable concept when asserted in defense of individual rights but not acceptable when asserted for the sake of special economic interests. *See*, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Appellants would introduce a doctrinal shift in Supremacy Clause analysis, altering the established all-or-nothing approach to one which would permit distinctions among similar taxes in a manner reminiscent of Commerce

16. *See*, Wechsler, *The Political Safeguard of Federalism—The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

Clause analysis. The Appellants clearly state that their proposed demonstration of fact at trial would be directed to the impact of the Montana tax at its present magnitude. Brief of Appellants at 45. Appellants' reference to the Wyoming severance tax strongly suggests that the challenge to the magnitude of the Montana tax, if successful, will be the first of many seeking judicial imposition of upper limits. Brief of Appellants at 9, n. 2.

The addition of a balancing of interests concept to Supremacy Clause analysis would compound the difficulties in preemption based on inferred national policies. Any such balancing of interests concept will destabilize the federal system, because it cannot be limited to a judicial compromise of the conflict between producers and consumers of coal. It must proceed to the more difficult question of what is a constitutionally acceptable rate for state severance taxes. This would inevitably require the Court to establish a uniform tax rate, or a uniform absolute rate of taxation per ton which accounts for the higher value of eastern coal per ton, or a consistent rationale for discriminating against western coal. If Appellants are correct, judicial determination of an acceptable rate of tax need not be premised on a clear directive of Congress.

To conclude, the "substantial frustration" test is inconsistent with the position of the states as co-equal partners in the federal system. It would permit the federal judiciary to selectively redefine the relation of federal and state powers in a way which benefits some states at the expense of others. If Congress intended the result that Appellants seek, Congress can express itself in a manner which leaves no doubt about the resolution of the national interests at issue.

III

APPELLANTS HAVE INCORRECTLY INTERPRETED THE POLICIES OF THE MINERAL LANDS LEASING ACT OF 1920, AS AMENDED, AND THEIR SUPREMACY CLAUSE CLAIM IS INVALID

By Count III of their Complaint, the Appellants requested invalidation of the Montana tax in view of the congressional policy and purposes which underlie the Mineral Lands Leasing Act of 1920, as amended. Brief of Appellants at 46 *et seq.* Again, Appellants argue that the Montana tax stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977). Appellants' argument fails due to a specific provision of the 1920 Act (Ch. 85, §32,41 Stat. 450, 30 U.S.C. §189 (1976)) which directly conflicts with their position:

> Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

Appellants contend that the 1920 Act represents a compromise which excludes the concurrent taxation jurisdiction of the states. Their conclusions are based upon faulty analysis of the legislative history.

The Mineral Lands Leasing Act of 1920 was not the culmination of a century of debate but rather a decade of debate precipitated by federal pricing policies for coal lands and President Taft's withdrawal of portions of the public do-

main from oil location in 1909.[17] These changes in federal policies deprived the public domain states of the opportunity to develop additional taxable property, as well as to control development of natural resources within their borders, conditions that had previously guided the public land law of the Union.[18] A compromise was finally reached, not on the 1916 House bill, Brief of Appellants at 46, n. 1, but on a Senate bill introduced in 1919.[19]

The compromise provided for both the division of the federal royalty and continued state taxation.[20] Under Section 35 of the 1920 Act, the federal govenment and the states divided the federal royalty, with the state share being

---

17. 58 Cong. Rec. 7773 (1919).

18. *Id.*, at 7772-7774; *See also*, H.R. Rep. No. 17 (Part 2), 64th Cong., 1st Sess. 8 (1916) (Minority views as expressed by Representative Taylor).

19. For a general account of the events leading to the passage of the 1920 Act, see 1 AMERICAN LAW OF MINING 71-86 (1960). The 1920 Act, in stark contrast to the 1916 proposal of the House, received the praise of Representative Taylor. 59 Cong. Rec. 2711 (1920).

20. 58 Cong. Rec. 7646-7649 (1919) (Mr. Mondell); 58 Cong. Rec. 7652 (1919) (Mr. Ferris).

directed to roads and schools.[21] Mineral Lands Leasing Act of 1920, Ch. 85, §35, 41 Stat. 450. Under Section 32, the states retain taxation authority over private lessees and the produce of their labors, including "the output of mines" and other improvements.

The legislative history of the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083, demonstrates the continuing vitality of that compromise. When the issue of a fair return to the public for federal coal resources was expressly considered by the House Interior Committee, not one word was said of impediments posed by state severance taxes. H. R. Rept. No. 94-681, 94th Cong., 2d Sess., *reprinted in* [1976]. U.S. Code Cong. & Ad. News 1953. Nor was any intention to preempt state taxes expressed in the context of increasing the state share of federal royalties to meet social and economic impacts. *Id.*, at 1955. Indeed, the Committee's expression of concern for the "onerous" nature of the then existing restrictions strongly suggests that the Congress never believed that it had preempted general state taxation powers. *Id.*

The Federal Coal Leasing Amendments Act of 1975 is not an anomaly in this regard. The Power Plant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. §§8301 *et seq.* (Supp. III 1979), evidences a similar recognition of state taxation powers in both its text, §601 (a) (2), and its legislative history, S. Rep. No. 95-361, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173.

Indeed, the potential for mismatch between federal royalties and impact needs has already received congressional attention. Section 35 of the Mineral Lands Leasing

---

21. *See generally* 58 Cong. Rec. 7777 (1919) (Mr. Hersman).

Act was amended by Section 317 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2770, to merely require the states to give priority to those subdivisions impacted by development of minerals leased under the 1920 Act; otherwise the revenues are to be used as the state legislature may direct. 30 U.S.C. §191 (Supp. III 1979).

Count III of Appellants' Complaint was, therefore, properly dismissed.

CONCLUSION

This Brief has focused on the full realm of compelling state interests underlying state coal severance taxes. The fiscal intrests surround the state's present and future duty and ability to deliver those traditional governmental services, facilities and functions which their citizens require. The regulatory interests focus on resource development and enhancement. These compelling state interests[22] require the courts to give great deference to state legislative determinations; particularly when the only challenge is that the tax is not fairly related to the services and benefits provided by the state to the taxpayer. More extensive judicial scrutiny,

---

22. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree and the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate commerce.

for the benefit of Appellants' narrow economic interests, undermines important state decisions on the method and manner for providing governmental services.

In deferring to legislative determinations, this Court should apply the analysis of *Minnesota* v. *Clover Leaf Creamery Co.*,_____U.S._____, 49 U.S.L.W. 4111 (1981), and hold that the burden imposed by Montana's severance tax is not clearly excessive in light of the substantial present and future state fiscal and regulatory interests. In weighing these interests, it is up to the legislature, not the courts, to decide the wisdom and utility of legislation. Because the question is "at least debatable" regarding the relation of the tax to the state and local interests, "it is not the function of the court to substitute their evaluation of legislative facts for that of the legislature." *Id.*, at 4115.[23]

The judgment of the Supreme Court of the State of Montana should be affirmed.

---

23. Although, based on the Court's Equal Protection analysis, the Court reaffirmed the same scrutiny under the Commerce Clause. *See, Minnesota, supra,* at 4116.

Respectfully submitted,

John D. Troughton,
Attorney General
Of Wyoming,
Counsel of Record
Mary B. Guthrie,
Assistant Attorney
General
Dennis M. Boal,
Assistant Attorney
General

Nancy D. Freudenthal,
Special Assistant
Attorney General
State Capitol
Cheyenne, Wyoming
82002
(307) 777-7841

Of Counsel
Steven F. Freudenthal
David D. Freudenthal
Sherman & Howard
1712 Pioneer Avenue
Cheyenne, Wyoming
82001
(307) 632-1712

Alan B. Minier
Hirst & Applegate
Boyd Building
Cheyenne, Wyoming
82001
(307) 632-0541

Counsel for *Amicus Curiae*
State of Wyoming

J.D. MacFarlane
Attorney General
of Colorado

David H. Leroy
Attorney General
of Idaho

Richard H. Bryan
Attorney General
of Nevada

Kenneth O. Eikenberry
Attorney General
of Washington

Dave Frohnmayer
Attorney General
of Oregon

February 1981

No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY, *Appellants,*

-against-

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER, *Appellees.*

On Appeal From The Supreme Court Of The State Of Montana

BRIEF AMICI CURIAE

ANN B. VANCE
204 Russell Senate
Office Bldg.
Washington, D.C. 20510
(202) 224-6441
Counsel of Record

DENNIS CHARLES STICKLEY
6205 Dirksen Building
Washington, D.C. 20510
(202) 224-3424
Legislative Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-581

COMMONWEALTH EDISON COMPANY, *et al.*,
Appellants,

-against-

STATE OF MONTANA, *et al.*,
Appellees.

On Appeal From The Supreme Court Of The State Of Montana

BRIEF AMICI CURIAE

This brief amici curiae is filed by the following Wyoming Congressmen: Senator Malcolm Wallop, Senator Alan K. Simpson, and Representative Richard B. Cheney.

INTEREST OF THE AMICI CURIAE

The amici are representatives of one of this Nation's major coal producing states. Wyoming is suffering sorely from the environmental and socio-economic impacts of large scale coal mining and energy development. The amici believe that the standards for determining what local taxes should be imposed on coal mining, to provide the benefits of a civilized society, are political questions for the state legislatures and are beyond the institutional competence of the federal judiciary. This brief also serves to inform the Court that Congress is far from being united in its approach to the issues involved in this case.

ARGUMENT

To avoid burdening the court with redundant arguments, amici adopt and hereby incorporate by reference the arguments so eloquently made in the brief amici curiae for the State of Wyoming.

CONCLUSION

For the reasons stated by the Wyoming amici, the judgment of the Supreme Court of the State of Montana should be affirmed.

Respectfully submitted,

ANN B. VANCE

Attorney for Amici Curiae

February 23, 1981